Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

in the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-564

WELDON WATKINS and
CHRISTINE WATKINS,

Petitioners,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to ~~of the State of New York Court of Appeals, and/or~~ the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

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of Counsel

INDEX TO PETITION FOR WRIT OF CERTIORARI

	Page
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
HOW THE FEDERAL QUESTIONS WERE PRESENTED	4
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	5
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	18
CERTIFICATE OF SERVICE	19

INDEX TO APPENDIX

Page

Notice of Motion, County Court, County of Suffolk, Indictment No. 1566/76 1

Memorandum Decision, Supreme Court, Suffolk County, Criminal Term, February 28, 1977 50

Supplemental Motion, Supreme Court, County of Suffolk, Indictment No. 1566/76 57

Order Denying Supplemental Motion, Supreme Court, Criminal Term, Suffolk County, March 27, 1977 62

Order Affirming Judgment of Conviction, Appellate Division, Supreme Court, State of New York, Second Judicial District, June 26, 1978 68

Certificate Denying Leave, State of New York, Court of Appeals, July 6, 1978 70

Order Denying Motion, Appellate Division, Supreme Court, State of New York, Second Judicial District July 19, 1978 71

Letter Denying Application for Stay, Supreme Court of the United States August 3, 1978 73

Excerpts of Trial Testimony in the Supreme Court, County of Suffolk 74

First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States 94

Title 18, United States Code Section 2518 96

New York Criminal Procedure Law 100

TABLE OF CITATIONS

Case **Page**

Franks v. Delaware
____U.S.____, ____S. Ct. ____, ____L. Ed. 2d ____;
46 L.W. 4869 (decided June 26, 1978) 6

People v. Alfinito
16 N.Y. 2d 181; 264 N.Y.S. 2d 243; 211 N.E. 2d
644 (1965) 6

People v. Nicolette
34 N.Y. 2d 249 (1974); 356 S. 2d 855; 313 N.E. 2,
336 16

People v. Sher
38 N.Y. 2d, 600 (1976); 381 S. 2d, 843; 345
N.E. 2, 314 16

People v. Szymanski
62 Misc 2d 1065 (1970); 310 S. 2d 587 16

Scott v. United States
____ U.S. ____; ____ S. Ct. ____; 57 L. Ed. 2d
65; 46 L.W. 4433 (decided May 15, 1978) 10

United States v. Chavez
416 U.S. 562; 94 S. Ct. 1849; 40 L. Ed. 2d 380..... 17

United States v. Donovan
429 U.S.; S. Ct. 658; 50 L. Ed. 2d 652 10

United States v. Kahn
415 U.S. 143; 94 S. Ct. 977; 39 L. Ed. 2d 225 17

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WELDON WATKINS and
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vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari of the State of New York Court of Appeals, and/or the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

The Petitioners, Weldon Watkins and Christine Watkins, pray that this Court will issue its writ of certiorari to the State of New York Court of Appeals, and/or The Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

The decision sought to be reviewed is the New York State Court of Appeals refusing the granting of leave to appeal (July 6, 1978) (A. pg 57) the order of the Supreme Court of the State of New York Appellate Division, Second Judicial Department, affirming the conviction of the petitioners, WELDON WATKINS and CHRISTINE WATKINS. Said order being entered on June 26, 1978. (A. pg. 56)

68

CITATION TO OPINION BELOW

At the time of this writing the only published opinion is the decision by the trial court on the supplementary pretrial motion. [89 Misc 2d 870, 393 N.Y.S. 2d 283 (1977)]. The Appendix to this petition contains all other opinions and decisions in their entirety.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C., Section 1257 (3) because the petitioners have been deprived of their Fourth, Fifth, Sixth and Fourteenth Amendment rights, through the decisions and judgments of the State of New York Court of Appeals, The Supreme Court of the State of New York, Appellate Division, Second Judicial Department and the Supreme Court of the State of New York for the Tenth Judicial District.

The decision on which review is sought was rendered by the highest Court of the State. All Appellate remedies of the state courts have been exhausted as to the questions presented herein.

QUESTIONS PRESENTED

1. Whether a defendant in a State Criminal Trial has a right, under the Fourth and Fourteenth Amendments to the United States Constitution, to a pre-trial hearing when the truthfulness of factual statements contained in an affidavit made in support of the issuance of an *ex-parte* eavesdropping order is properly challenged.

2. Whether the failure of a state trial court to hold a pre-trial hearing to determine the admissibility of the fruits of a wiretap seizure violates the defendant's rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, when such hearing was properly demanded.

3. Whether the intentional withholding from the court issuing an eavedropping order of the fact that the executing authority during the course of the intercept knowingly intercepted and intentionally continued to intercept inter-spousal communications, violates the defendant's rights under the Fourth and Fourteenth Amendments to the United States Constitution.

4. Whether the intentional withholding of the known identities of the true targets of a gambling investigation by the applicants for an eavesdropping order from the issuing court violates the defendant's rights under the Fourth and Fourteenth Amendments to the United States Constitution.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

The Federal questions were raised in these proceedings by pre-trial motions, during the course of the trial, the appellate briefs, the oral application for leave to appeal to the New York State Court of Appeals, the application to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department for a stay of execution of sentence pending a petition for a writ of certiorari to the United Staes Supreme Court, in an application for reargument to the New York Court of Appeals; and in an application to the United States Supreme Court for a Stay of Execution of the sentence pending the determination of this petition (Marshall, J. denied 8-2-78).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions and statutes are set forth in their entirety in the Appendix hereto:

Fourth Amendment to the United States Constitution (A.80)

Fifth Amendment to the United States Constitution (A.80)

Sixth Amendment to the United States Constitution (A.80)

Fourteenth Amendement to the United States Constitution (A.80)

Title 18 United States Code, Section 2518 (A.81)

New York Criminal Procedure Law Section 700.20 (A.87)

New York Criminal Procedure Law Section 700.30 (A.88)

New,York Criminal Procedure Law Section 700.50 (A.89)

New York Criminal Procedure Law Section 710.60 (A.90)

STATEMENT OF THE CASE

This was a criminal proceeding commenced in 1976 against the petitioners WELDON WATKINS and CHRISTINE WATKINS (et al) for violations of Sections 225.10, 225.20 and 105.05 of the New York State Penal Law. The nature of the charges were promoting gambling and possession of gambling records as a felony, and conspiracy as a misdemeanor. After a jury trial the petitioner WELDON WATKINS was convicted of promoting gambling and the petitioner, CHRISTINE WATKINS, of promoting gambling and possession of gambling records.

The arrest came as a result of the fruits of a wiretap order issued against a Willie J.Clark. The truthfulness of the affidavit in support of the wiretap order was challenged by pre-trial motions (A.1,57) The trial court failed to hold pre-trial hearings although they were properly requested in accordance with New York law. [Section 710.60, (4), Criminal Procedure Law of the state of New York].

The trial Court determined the admissibility question without ever hearing the contents of the tape recordings of the wiretap or without ever viewing the transcript of the tape recordings.

The petitioner, WELDON WATKINS, was sentenced to one year incarceration in the County jail and the petitioner, CHRISTINE WATKINS, to five years probation.

The trial court's actions were sustained in the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, (A.68). Leave to appeal to the New York State Court of Appeals was denied. (A.70).

Motion for reargument to the Court of Appeals was denied on July 28, 1978.

Motion for stay of execution of sentence pending a petition to this Court was denied by the Supreme Court of the State of New York, Appellate Division, Second Judicial Department (A.71).

A motion to this court for a stay of execution was denied on August 2, 1978 (Marshall, J.). (A.73).

REASONS FOR GRANTING THE WRIT

I.

This Court on June 26, 1978 [*Franks v. Delaware*, ____U.S.____, ___S. Ct. ____, ___L. Ed. 2d____, 46 L. W. 4869, No. 77-5176], held that the Fourth Amendment to the United States Constitution requires a state to grant a defendant an opportunity to a hearing when the defendant properly challenges the truthfulness of statements contained in an affidavit in support of an ex-parte search warrant.

New York State's highest court [*People v. Alfinito*, 16 N.Y. 2d 181; 264 N.Y.S. 2d 243; 211 N.E. 2d 644, 1965] has

also held that the hearing alluded to in *Franks v. Delaware*, [supra], is mandatory.

The New York State Criminal Procedure Law [Section 710.60,4.] (A. 100) uses the word "must" when referring to pre-trial suppression hearings.

In spite of the Legislative and Judicial mandates in this area the petitioners were denied a hearing after sufficiently and properly attacking the truthfulness of statements contained in an application for an ex-parte eavesdropping order (A.62).

It is submitted that the failure of the trial court to hold the pre-trial hearing violated the petitioners' rights under the Fourth and Fourteenth Amendments to the United States Constitution.

The reason why this Honorable Court should hear this case is that while *Franks v. Delaware*, [supra], *People v. Alfinito* [supra] and the New York Statute [supra], all speak of search warrants, a logical extension of the case doctrines would be to extend the protection to any ex-parte application in which the truthfulness of the allegations contained in the application seeking such order is properly challenged. In the case at bar we argue that the Fourth Amendment applies with equal thrust to applications for *ex parte* eavesdropping warrants as it applies to search warrants.

II

The petitioners herein by pre-trial motions (A.1,57) moved to suppress the fruits of the seizure made pursuant to the wiretap order. Although New York Law [Section

710.60 (4)] provides for a pre-trial hearing to determine the admissibility of the seizure, the trial court failed to determine the admissibility questions at a pre-trial hearing.

It is submitted that the failure to hold the pre-trial admissibility hearing violated the petitioners' due process rights under both Federal and State law.

By leaving the admissibility questions until the trial, in order to contest the admissibility the petitioners would have been required to take the stand and testify in front of the jury in violation of their Fifth Amendment rights to remain silent. [Fifth Amendment to the United States Constitution, A.94]. The denial of the admissibility hearing also deprived the petitioners of the effective assistance of counsel [Sixth Amendment to the United States Constitution, A. 94], in that counsel was prohibited from attacking the admissibility of the seizure unless he chose to waive the petitioners' right to remain silent.

It is respectfully submitted that due process prohibits a petitioner from being required to testify on his own behalf in front of a jury to challenge the admissibility of evidence when a proper vehicle for such challenge is provided for by statute and such mandate is ignored by a trial court.

III

It is respectfully submitted that the trial court erred in failing to suppress the evidence seized on the ground that the executing authority [The Special Investigations Squad of the Suffolk County Police Department working under the direction of the Suffolk County District Attorney's Rackets Bureau] intentionally seized privileged communications in violation of the eavesdropping order (A.1,50).

The New York Statute [Criminal Procedure Law of the State of New York, Section 700.20 (2)(c) (A.100)] has a stricter minimization requirement than the Federal Statute. [18 United States Code, Section 2518, (A.96)] in that the application for a state eavesdropping warrant must contain "a statement that such communications (to be intercepted) are not legally privileged."

The executing authority had knowledge of the marital relationship of the parties prior to the application for the eavesdropping order [Trial Transcript p. 73, Morro; p. 166, 168, 200, Cseh, (A. 76, 85, 86, 90)].

The petitioners' voices were instantly recognized by each monitoring police officer [Trial Transcript p. 61, 66, Morro; 87, 88, 90, 98, Hoge; 98, 99, 143, et seq Cseh (A. 74, 75, 77-84) incl.], when they appeared on the wiretap monitor. The petitioners' voices were checked prior to the execution of the order [Trial Transcript p. 188, 190 (A. 86, 87)].

The logical conclusion from the police actions is that they knew that the petitioners' voices would appear on the wiretap.

The intentional failure of the executing authority to notify the issuing authority (Stark, J., A. 1,50)of the probability of privileged communications being intercepted denied the issuing courts of the right to set standards or request periodic reports on the status of the wiretap. The police actions were violative of New York Statutory Law [Criminal Procedure Law of the State of New York, Section 700.30 and 700.50 (A. 100)].

Justice Marshall in his learned dissent in United States v. Donovan [429 U.S. 413, 97 S. Ct. 658, 50 L. Ed. 2d 652] stated that an intentional and flagrant violation of a criminal statute cannot be tolerated.

What occurred in the case at bar, is the executing authority deliberately substituted its own judgment as to what might or might not be a privileged communication for that of the judiciary. This cannot be tolerated.

The trial court herein compounded the error by failing to listen to the contents of the seizure prior to its ruling that the evidence was admissible. Thus the Court supported the proposition that the fruits of a seizure justify the means employed to obtain them.

This proposition along with the intentional usurpation of judicial power by the executing authority violates the petitioners' rights under the Fourth and Fourteenth Amendments to the United States Constitution [supra].

IV

This Court has held that the unintentional failure to name a target in an application for an eavesdropping order would not be fatal to the validity of such order [United States v. Donovan, supra]. This Court has further held that failure to name the target would not be fatal if the order would have been issued had the target been named. [Scott v. United States, ____U.S.____,____S. Ct.____, 57 L. Ed. 2d 65; 46 L.W. 4433, decided May 15, 1978]

However, the question arises, does the intentional witholding of the identity of the true target of an eavesdropping order from the issuing court invalidate the order? It is submitted that the order should be invalidated, not because there may or may not have been probable cause for the issuance of the order but because we cannot tolerate deliberate violation of our penal statutes by our law enforcement officials.

This Court is respectfully referred to both the majority and dissenting opinions of United States v. Donovan [supra].

The majority stated:

> "There is no suggestion in this case that the government agents *knowingly* failed to identify respondents...for the purpose of keeping relevant information from the District Court that might have prompted the Court to conclude that probable cause was lacking. *If such showing had been made we would have a different case.*"

97 S. Ct., p. 672, N. 23 (emphasis added)

Justice Marshall in his dissent likewise stated the following:

> "The Court's opinion implies that if the violations of Title III considered here had been intentional the result would be different. Ante at 671-672, N 23, 673 N26. This must be so for surely this Court would not tolerate the Government's intentional disregard of duties imposed by Congress"

97 S. Ct., at 679.

It is respectfully submitted that the omission of the petitioners names from the applications for the eavesdropping warrant was intentional in this case.

The trial testimony clearly indicates that the true targets were the petitioners herein, as follows:

"The Court: When did either of them (Weldon Watkins, Christine Watkins) become a target of your investigation?"

"The Witness: (Detective Cseh) When I was aware that Willie Clark—a policy operation was going on at Willie Clark's house, I knew—I figured that Weldon Watkins would be involved because I had known that Willie Clark worked for Weldon Watkins"

(Trial Transcript .271, 272) [A.91]

Obviously this knowledge existed prior to the application for the eavesdropping order since he had to know Willie Clark was conducting an operation prior to the making of his affidavit.

In his summation, the trial prosecutor reinforced the fact that it was Watkins and not Clark who was the actual target of the investigation as follows:

"I submit to you that every penny of the $2,300. was controlled by Weldon Watkins not by Willie Clark. *He (Clark) was a little fish who added up the numbers. (It was Watkins) who ran the operations.*"

(emphasis added)

(Trial Transcript . 375) [A. 92)]

Upon cross-examination it became crystal clear that Detective Cseh fully expected the voices of both petitioners to appear on the interception as follows:

"Q. Let me ask you this: You said you spoke to Mr. Watkins on the telephone a number of times?"

"A. That's correct"

"Q. The date in question is October 8, 1976, correct?"

"A. That I spoke to him on the telephone?"

"Q. No the date of the arrest."

"A. That's correct."

"Q. How long prior to that date was the last time you spoke to him on the telephone?"

"A. Approximately—Well in between a week and a half to three weeks prior to that."

(Note, surveillance began October 4, 1976 and ended October 8, 1976)

"Q. And what was that conversation in relation to?"

"A. I had called Trailer Time."

"Q. For what purpose?"

"A. To speak to him to—under a ruse of buying a trailer, some equipment."

(A. 73)

"Q. And what was the purpose of that call?"

"A. To further substantiate that I knew the voice to be Weldon Watkins."
(A.87, 88)

Detective Cseh's actions show beyond a doubt that Christine Watkins was also a target as follows:

"Q. Let me ask you this: have you ever spoken to Christine Watkins on the phone?"

"A. Yes, I have."

"Q. When was the last time prior to October 8, 1976 that you spoke with Christine?"

"A. It was approximately the same time as I made the phone call to Weldon Watkins. In—within a day or two of that time."

"Q. And where did you call Christine Watkins?"

"A. At her home." (A. 89)

Cross-examination further developed that Detective Cseh knew of prior arrests and convictions for gambling for both appellants and their prior involvement in gambling activities at the time of the initial investigation as follows:

"The Court: Well sir, isn't it a fact that you knew at the time you were investigating this case that Mr. Watkins had been in gambling activities before?"

"A. Yes Sir, I did."

"Q. The Court: And that Mrs. Watkins had been in gambling activity before?"

"A. Yes Sir, I did." (A. 84, 85)

It is respectfully submitted that from the quoted testimony it is clear Detective Cseh knew of the involvement of the appellants with Willie Clark prior to submission of the application for the eavesdropping order. He called both petitioners prior to the execution of the eavesdropping order so he could identify their voices *when* they appeared on the surveillance monitor and he knew of the prior gambling activities of the petitioners. It is clear that he failed to name either petitioner in his application and did not make any interim reports to the issuing justice. Thus, his exclusion of the names of both petitioners must be concluded to be intentional.

By the intentional omission of the petitioners' names in the affidavit, the issuing Court was unable to determine the identity of the true targets of the investigation prior to issuance of the order. The Court also was denied meaningful control or supervision over the execution of the order, and the right to determine if probable cause existed as to the petitioners and what investigative procedures, if any, would be explored prior to utilizing the drastic device of electronic surveillance. Finally, the court was denied the control necessary to insure that the petitioners due process rights were protected.

Criminal Procedure Law, Section 700.20 (2) (b) (iv) [New York Criminal Procedure Law, Article 700, McKinney's 1971] states that an application for an eavesdropping order must include:

"(iv) The identity of the person, if known, committing such designated offense and whose communications are to be intercepted."

New York State wiretap orders must conform to the detailed requirements of Title III. [Omnibus Crime Control and Safe Streets Act of 1968; 18 USC, Sections 2510-2520, originally enacted as act of June 19, 1968, Public Law 90-351, Sections 802, 82 Stat. 212; hereinafter referred to as Title III]. The interpretation of the Federal requirements are mere minimum standards and state statutes can be more stringent than Title III. [Senate report No. 1097, note 34 at 2187; Senate Report No. 1097, 90 Congress 2nd Session; 1968 US Code Cong & Ad News 2180; Commonwealth v. Vitello, (Mass.) 327 NE 2d 819, 833 (1975); State v. Maloof (RI), 333 A 2d 676, 681 (1975]

In fact, New York State requires Article 700 C.P.L. to be strictly construed. [People v. Sher, 38 NY 2d 600, 1976, 381 S. 2d, 843, 345 N.E. 2, 314; People v. Nicolette, 34 NY 2d 249, 1974, 356 S. 2d 855, 313 N.E. 2, 336; People v. Szymanski, 62 Misc. 2d 1065, 1970, 310 S. 2d 587]

While all states are bound by constitutional requirements, the individual states are free to enact stricter standards than those imposed by Congress. [James G. Carr, "The Law of Electronic Surveillance", Clark, Boardman Company; NY 1977, p. 190-191].

Thus, at the very least, the case at bar must be removed from the aegis of Donovan [supra] because in the case at bar, *the failure to name the petitioners was intentional.*

Furthermore, but arguendo only, should it somehow be concluded that the omission of the petitioners names

from the application for the eavesdropping order was unintentional then it should not further be concluded that the New York State Legislature was acting under the same state of mind as the Supreme Court believed the United States Congress was when enacting Title III.

This Court is respectfully urged to note that the New York legislature had the benefit of the Federal statute prior to enacting Article 700 C.P.L. and as late as 1976 concluded that Article 700 must be strictly construed. [*People v. Sher*, supra]. Unlike the Federal Congress, the New York Court of Appeals, had benefit of the Supreme Court's decisions in Kahn and Chavez, [United States v. Kahn, 415 U.S. 143, 94 S. Ct. 977, 39 L. Ed. 2d 225; United States v. Chavez, 416 U.S. 562, 94 S. Ct. 1849, 40 L. Ed. 2d 380] before promulgating the state statute. A state may apply stricter standards than the Federal Government in determining what acts are to be prohibited; it should not be assumed that New York acted in ignorance or in a vacuum.

A vital factual distinction herein is that in *Donovan*, [supra], the identities were learned subsequent to issuance of a valid wiretap order and the failure to identify arose during the extension of that order. In the case at bar the true targets were neither named nor otherwise identified in the original order although they were known before application was made for such original order.

Paraphrasing the language in *Kahn*, [*United States v. Kahn*, supra] the government is required to identify an individual in an application for an eavesdropping warrant if it has probable cause to believe, first, that the individual is engaged in the criminal activity under investigation, and second, his conversation will be intercepted over the target telephone.

This *de minimus* probable cause standard for eavesdropping warrants is clearly met in the case at bar. Det. Cseh knew of the petitioners' involvement with the Clark operation and he telephoned each of the petitioners prior to the institution of the surveillance to identify their voices. Thus it can only be concluded from Det. Cseh's actions that the individuals conversations would be intercepted over the target telephone.

Thus, it is respectfully submitted that this Court should grant the Writ of Certiorari so it can be expand on its "intentional omission to pry" and set guidelines as to what is an intentional omission and what sanctions will be imposed for an "intentional omission."

CONCLUSION

Petitioners, WELDON WATKINS and CHRISTINE WATKINS, respectfully request this Honorable Court to grant a Petition for Writ of Certiorari to the State of New York Court of Appeals and/or the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

Respectfully submitted,

SHAPIRO, SOMER & WAND
Attorneys for Petitioner
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(516) 499-5500

by: /s/_____
STANLEY L. SHAPIRO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to the Honorable Patrick Henry, District Attorney of Suffolk County, Criminal Courts Building, Center Drive South, Riverhead, New York 11901; and I also certify a true and correct copy of the above and foregoing was mailed to the Honorable Sol Wachtler, Associate Judge, State of New York Court of Appeals.

By: /s/_____
STANLEY L. SHAPIRO

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APPENDIX

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WELDON WATKINS and
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Petitioners,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari of the State of New York Court of Appeals, and/or the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

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INDEX TO APPENDIX

Page

Notice of Motion, County Court, County of Suffolk, Indictment No. 1566/76 1

Memorandum Decision, Supreme Court, Suffolk County, Criminal Term, February 28, 1977 50

Supplemental Motion, Supreme Court, County of Suffolk, Indictment No. 1566/76 57

Order Denying Supplemental Motion, Supreme Court, Criminal Term, Suffolk County, March 27, 1977 62

Order Affirming Judgment of Conviction, Appellate Division, Supreme Court, State of New York, Second Judicial District, June 26, 1978 68

Certificate Denying Leave, State of New York, Court of Appeals, July 6, 1978 70

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Letter Denying Application for Stay, Supreme Court of the United States, August 3, 1978 73

Excerpts of Trial Testimony in the Supreme Court, County of Suffolk 74

First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States 94

Page

Title 18, United States Code Section 2518 96

New York Criminal Procedure Law..... 100

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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THE PEOPLE OF THE STATE OF NEW YORK

— against — NOTICE OF OMNIBUS MOTION

CHRISTINE WATKINS, WELDON WATKINS, WILLIE CLARK and FREDERICK HILL, Ind. #1566/76

Defendants.

..... x

S I R:

PLEASE TAKE NOTICE that upon the annexed affirmation of Stanley L. Shapiro, Esq., duly affirmed the 8th day of December 1976, the affidavits of Christine Watkins, Weldon Watkins, Willie Clark and Frederick Hill, the defendants named herein, duly sworn to the 8th day of December 1976, and upon all of the previous pleadings and proceedings heretofore had herein, the undersigned will move this Court in Part 4, before the Honorable John J.J. Jones, in the Suffolk County Criminal Courts Building, Center Drive South, Riverhead, New York on the 21st day of December 1976 at 9:30 A.M. or as soon thereafter as the case can be reached, for an Order granting the defendants the following relief:

I. An inspection of the Grand Jury minutes pursuant to Section 210.30(2) of the Criminal Procedure Law ("CPL").

II. A dismissal of the indictment pursuant to Section 210.20 (b) of the CPL on the ground there was insufficient evidence before the Grand Jury.

III. A dismissal of the indictment pursuant to Sections 190.25(6), 210.20(1)(c) and 210.35(5) of the CPL on the ground the district attorney failed to provide sufficient, recorded charges and instructions to the Grand Jury.

IV. Suppression of all telephonic communications, pursuant to Section 710.20(2) of the CPL, on the ground that the eavesdropping warrant dated September 15, 1976, was unlawfully authorized, and that Article 700 of the CPL, particulary Section 700.30(2) violates the Federal Constitution.

V. Suppression of all property, pursuant to Section 710.20(1) seized as a result of the unlawful eavesdropping.

VI. A Bill of Particulars as to the minimization, sealing and related requirements of Article 700 of the CPL.

VII. A Bill of Particulars of the indictment pursuant to Section 200.90 of the CPL.

VIII. A discovery and inspection pursuant to Section 240.20(1) of the CPL.

IX. A Huntley hearing to suppress involuntary statements pursuant to Sections 60.45(1) and 710.20(3).

X. A Wade hearing to suppress identifications of the defendants pursuant to Sections 710.20(5) and 710.60(4).

XI. A discovery and inspection of all *Brady* material under Section 240.40 of the CPL.

XII. A Sandoval hearing to determine which prior crimes, if any, relating to the defendants will be permitted to be used by the prosecution for impeachment purposes if the individual defendant takes the stand to testify in his or her own behalf.

XIII. An audibility hearing of all recorded tapes.

XIV. A discovery and inspection of all tape recordings for the purpose of making voice identifications;

and for such other relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, be served upon the undersigned within five (5) days of the return date of the instant motion.

Dated: Suffolk, New York
December 9, 1976

Yours, etc.
SHAPIRO AND SOMER, ESQS.
Attorneys for Defendants
Office & P.O. Address:
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Wyandanch, New York 11798
(516) 643-8030

TO:

Clerk—County Court
Criminal Courts Building
Riverhead, New York 11901

District Attorney
Suffolk County
Criminal Courts Building
Riverhead, New York 11901

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

..... x

THE PEOPLE OF THE STATE OF NEW YORK

— against — AFFIRMATION
Ind. #1566/76

CHRISTINE WATKINS, WELDON WATKINS, WILLIE CLARK and FREDERICK HILL,

Defendants.

..... x

STATE OF NEW YORK)
SS.:
COUNTY OF SUFFOLK)

STANLEY L. SHAPIRO, an attorney at law, duly admitted to practice in the State of New York, respectfully affirms under the penalty of perjury:

That I am a member of the firm of Shapiro and Somer, the attorneys for the defendants herein and I have fully familiarized myself with the facts and circumstances of the within action. That I gained my familiarity through conferences with my clients, investigation of the case and materials contained in the file.

This affirmation is made in support of defendants' Omnibus Motion and deals with the legal argument aspects thereof.

Defendants are charged with the crimes of conspiracy

in the third degree (count one), promoting gambling in the first degree (count two) and possession of gambling records in the first degree (count three). A copy of the indictment is annexed hereto.

I and II — AS TO INSPECTION OF THE GRAND JURY MINUTES AND DISMISSAL OF THE INDICTMENT

Defendants move for an inspection of the grand jury minutes pursuant to Section 210.30(2) of the CPL. This motion is required prior to an application to dismiss the indictment for legal insufficiency as set forth in Section 210.30(1). See *People* v. *Frisbie*, 40A.D. 2d 334, 339 N.Y.S. 2d 985.

It is respectfully submitted that an inspection of said minutes will reveal that the evidence produced before the grand jury was not legally sufficient to establish the offenses charged (or any lesser included offenses) in the indictment. Thus, after such inspection the Court is respectfully requested to dismiss the indictment pursuant to Section 210.20(b) of the CPL.

Upon information and belief, the only witnesses who testified before the grand jury were detectives assigned to the investigation of this case. There were no civilian or lay witnesses before the grand jury.

Accordingly, there were no eyewitnesses to any of the crimes allegedly committed herein. The detectives who testified merely presented their so-called expert opinions which were no more than conclusory statements not supported by any proper evidence before the grand jury.

Even the electronic recordings played before the grand jury were not sufficient or proper evidence. The recordings alone were not proof of the commission of any of the crimes charged in the indictment.

The detective witnesses merely gave their opinions and speculations as to the meaning of the words contained in those recordings. Thus, mere speculation was presented to the grand jury. It is respectfully submitted that speculation alone is not sufficient upon which an indictment may be predicated. Accordingly, the indictment is insufficient and should be dismissed.

III — AS TO DISMISSAL OF THE INDICTMENT PURSUANT TO SECTIONS 190.25(6), 210.20(1)(c) and 210.35(5)

It is submitted that the indictment should be dismissed on the ground that the district attorney failed to provide legal instructions in the form of a proper charge to the grand jury which should have been recorded in the stenographic minutes all as provided for in Sections 190.25(6), 210.20(1)(c) and 210.35(5) of the CPL.

As stated previously the indictment contains three separate charges, to wit, conspiracy, promoting gambling and possession of gambling records. Thus, it was the prosecutor's duty to deliver three separate charges to the grand jury. One distinct separate charge for conspiracy, then a second for promoting gambling and then a third for possession of records. Each charge had to contain each of the various elements of each crime. This was not done.

Upon information and belief, the district attorney gave one general charge lumping everything improperly together. See *People* v. *Bello*, 46 A.D. 2d 518; *People* v. *White*, 44 A.D. 2d 749; *United States* v. *Park*, 421 U.S. 658; *People* v. *Percy*, 74 Mis. 2d 522 *aff'd* 45 A.D. 2d 284; *People* v. *Mackey*, 82 Misc. 2d 766 and *People* v. *Cohen* (N.Y.L.S. Nov. 29, 1976, p. 11).

Furthermore, the district attorney in his charge to the grand jury did not advise the jurors that the detectives were only giving opinion evidence and that the jurors had the right to reject such opinions.

IV — AS TO SUPPRESSION OF TELEPHONIC COMMUNICATIONS

The indictment herein is based almost exclusively upon the resulting fruits of an Order signed by the Honorable Thomas Stark, a Justice of the Supreme Court, Suffolk County, on September 15, 1976, which permitted interception of telephonic communications. A copy of said Order and the papers upon which same is based is also annexed hereto.

The aforesaid eavesdropping warrant was granted pursuant to Article 700 of the CPL.

This motion to suppress all telephonic communications recorded herein is being made pursuant to Section 710.20(2) of the CPL. It is respectfully submitted that the warrant should be vacated and set aside on the ground it was unlawfully obtained.

The warrant authorizes the prosecution to intercept "Communications of Willie J. Clark and his confederates, occurring over telephone instrument number (516) 842-2184."

Willie J. Clark is the only defendant named in the warrant. Defendants Weldon Watkins, Christine Watkins and Fred Hill are not metioned or otherwise designated therein.

It is respectfully submitted that the word "confederate" is ambiguous and without legal definition and, thus, incapable of proper execution. The word "confederates" does not appear in Section 700.05 (definition paragraph) of the CPL nor in any other portion of Article 700 which is the sole eavesdropping authority contained in the CPL.

Likewise, "confederates" does not appear in Article 10 of the Penal Law (definitions provision) nor in Section 1.20 of the CPL which is the definition portion thereof. Of course, the word "confederate" appears in any standard dictionary but that is hardly sufficient authority for the predication of due process. To permit the warrant to stand would be tantamount to a "general warrant" which is not favored by law. *Stanford* v. *Texas*, 379 U.S. 476.

It is beyond question but that Article 700 must be strictly construed. *People* v. *Sher*, 3 N.Y. 2d 600, 381 N.Y.S. 2d 843; *People* v. *Nicoletti*, 34 N.Y. 2d 249, 356 N.Y.S. 2d 855 and *People* v. *Szymanski*, 62 Misc. 2d 1065, 310 N.Y.S. 2d 587.

Accordingly, it is respectfully submitted that the warrant should be quashed and vacated because it is too broad with the inclusion of the word "Confederate".

It is further respectfully submitted that Article 700 of the CPL is repugnant to the Federal Constitution in that it permits interception of telephone communications made by persons not named in the warrant authorizing the intercepts. It violates Fourth and Fourteenth amendment rights.

Again, it is stated that defendants Weldon Watkins, Christine Watkins and Fred Hill are not named in the warrant but, nevertheless, their communications have been intercepted and are being used against them.

Section 700.20(2)(iv) of the CPL provides that the person whose communications are sought to be intercepted must be named *only if his identity is known*. Under such loose control, dragnet operations become possible.

It is exactly this portion of the statute which the defendants now attack upon constitutional grounds. It is respectfully urged that, at best, wiretapping should be permitted only against named individuals. To permit otherwise could open the floodgates to governmental oppression.

The constitutionality of Section 700.20(2)(iv) has not been ruled upon by the state Court of Appeals nor by the Federal Supreme Court. An ancillary matter has been determined in *United States* v. *Kahn* 415 U.S. 143, wherein the Court found it necessary to construe a similar provision in Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Although statutory construction was involved therein, the Court, on page 150, specifically held that the question of constitutionality was not being raised or considered in that case. Thus, the question of constitutionality

was being left open for future consideration. (Also see *United States* v. *Picone*, 408 F.Supp. 255, footnote 6 on page 262). It should be kept in mind that the state statute closely follows the language of the federal legislation. See *People* v. *Sher, supra.*

However, in the event that the Court finds that Section 700.20(2)(iv) is proper legislation, then in such event defendants further claim that the suppression should still be granted because of the failure to include the names of both Watkins and Hill in the warrant and the application for the warrant.

The identities of Weldon Watkins, Christine Watkins and Fred Hill were known to Detective Jay Cseh. As a matter of fact, he had previously spoken to Christine Watkins and Weldon Watkins while Detective Frank Leonard, his partner, had spoken to Fred Hill.

These detectives also knew that they were involved in gambling activities. They also knew that their conversations would appear among the intercepted communications.

Under such circumstances, their names should have been included in the application for the eavesdropping warrant as well as in the warrant which was issued by the Court.

The failure to include their names invalidates the warrant particularly in view of the fact their conversations were intercepted.

See the following cases:

a) *United States* v. *Moore*, 513 F. 2d 485;

b) *United States* v. *Donovan*, 513 F. 2d 337, cert, granted 424 U.S. 907; 96 S. Ct. 1100; 47 L. Ed. 310

c) *United States v. Bernstein*, 509 F.2d 996.

In the foregoing cases, suppressions were granted wherein the prosecution failed to name the individuals in the warrant and/or in the application for the warrant.

In the supporting affidavit of Det. Cseh, he states on page 3, paragraph 4, that his information is based on the word of "a confidential and reliable informant." No other characterization is described to this unknown source. It is respectfully submitted that such basic conclusory language is insufficient to support the issuance of a warrant authorizing interception of telephonic communications. See *People* v. *Sciandra*, 65 Misc. 2d 923; 319 N.Y.S. 2d 516; and *People* v. *Miller*, 36 A.D. 2d 898; 320 N.Y.S. 2d 255.

The leading cases on the reliability of undisclosed informants are *Aquilar* v. *Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed. 2d 723; *Spinelli* v. *United States*, 393 U.S. 410, 89 S. Ct. 584; 21 L.Ed 2d 637; and *People* v. *Hendricks*, 25 N.Y. 2d 129, 303 N.Y.S. 2d 33. These cases enunciate a two-pronged test. As stated in *People* v. *Hendricks*, 25 N.Y. 2d at 133, 303 N.Y.S. 2d at 36:

> "...that test requires that the affidavit show (1) whether the informant is in fact reliable, and (2) whether the underlying circumstances as to how

the informant came by his information demonstrates sufficient probability to allow the search of the premises or person in question."

The probable cause required for the issuance of a warrant authorizing telephonic interception is the same as that required for the issuance of a search warrant. *People* v. *Kaiser*, 21 N.Y. 2d 86; 286 N.Y.S. 2d 801, *aff'd sub. nom. Kaiser* v. *New York*, 394 U.S. 280, 89 S. Ct. 1044, 22 L.Ed. 2d 274.

Herein, Det. Cseh presents absolutely nothing of a factual nature to support the conclusion that the informant is in fact reliable.

Likewise, there is nothing to show that the "so-called" underlying circumstances by which the informant allegedly obtained his information are sufficient probability of credibility to allow telephonic interception.

On the basis of the alleged informant, there was no probable cause for the issuance of the warrant and same should therefore be vacated.

In paragraph 5, Det. Cseh seeks to embellish the stature of the informant by claiming he previously supplied information "leading to the arrest of one Vincent A. Taylor". However, even this bit of surplusage does not elevate the status of the informant to the level required by law.

One isolated arrest is not sufficient to cloak an informer with judicial approbation. In this connection, an informant is acceptable only if his prior information has resulted in the conviction of other defendants. The test here is plurality; there must be more than one conviction. The

Court of Appeals has clearly stated an informer is reliable if he "in the past furnished information leading to the arrest and convition of *others*" (emphasis added). *People* v. *Montague*, 19 N.Y. 2d 121, and *People* v. *Rogers*, 15 N.Y. 2d 422, 424.

It is interesting to observe that Det. Cseh apparently realized the information supplied herein by this informer was not sufficient to support the issuance of an intercept warrant. This is demonstrated by the fact that Cseh in paragraphs 6 to 9 of his affidavit, undertook his own investigative procedures to verify the information received from the secret source.

If the original information was truly reliable, then Det. Cseh would have not wasted time in a superfluous investigation of his own. His investigation is a tacit admission of the informant's insufficiency.

Although the cases hold that a separate objective investigation of the informant's tale may be sufficient to support the issuance of an intercept warrant (see *People* v. *Cerrato*, 27 N.Y. 2d 1; *People* v. *Coffey*, 12 N.Y. 2d 443, *People* v. *Malinsky*, 15 N.Y. 2d 86 and *Beck* v. *Ohio*, 379 U.S. 89), it is respectfully submitted that herein Det. Cseh's investigation falls far short of the required standards, and does not establish proper probable cause for the issuance of the warrant.

In paragraph 8 of his affidavit, Det. Cseh states that he overheard and recorded a conversation on the subject telephone between the informant and the telephone subscriber. He reports the entire contents of said conversation as follows:

"Code numbers being discussed for collectors and/or runners, shortages being discussed, track or handles being discussed, and 'hits' for that day's policy transactions..."

It is respectfully submitted that such statement is false. I have been informed by defendant Willie Clark that he did not discuss code numbers for collectors and/or runners, shortages, track and handles and hits for that day's policy transactions.

If the content of that purported conversation is indeed false, then it certainly cannot support the issuance of the intercept warrant. See *People* v. *Solimine*, 18 N.Y.2d 477, and *People* v. *Alfinito*, 16 N.Y.2d 181.

Accordingly, it is respectfully requested that on this ground alone the warrant should be vacated or in the alternative, a hearing should be conducted on the issue of the truthfulness of *Det. Cseh's affidavit.*

V — SUPPRESSION OF ALL PROPERTY PURSUANT TO SECTION 710.20(1)

After the eavesdropping warrant is vacated, it is respectfully submitted that all evidence seized or otherwise obtained as a result of that warrant should be suppressed pursuant to Section 710.20(1) of the CPL.

The warrant authorized interception of telephone conversations held on instrument 842-2184 at premises 19 Booker Boulevard, North Amityville.

Det. Cseh on October 5, 1976 allegedly overheard certain telephonic conversations during the period of his monitoring. As a result thereof he obtained search warrants on October 8, 1976, directed at premises 1304 Straight Path, Wyandanch, 156 Merrill Street, Brentwood, and 19 Booker Boulevard, Amityville. These warrants were executed on October 8, 1976 at which time certain property consisting of papers, records and tablets were seized.

Since the eavesdropping warrant was unlawful, all subsequent warrants issued thereunder are likewise unlawful and all property seized thereunder must be suppressed upon the theory that "the fruit of the poisonous tree" must be excluded from evidence. See *Davis* v. *Mississippi*, 394 U.S. 721; *People* v. *Whitfield*, 34 A.D. 2d 582 and *People* v. *Bennett*, 28 A.D. 2d 526. Aforesaid search warrants, accordingly, should be vacated and items seized thereunder suppressed. See *People* v. *Fino*, 24 N.Y. 2d 1020.

VI — AS TO BILL OF PARTICULARS REQUIREMENTS OF ARTICLE 700

The warrant properly provides that the eavesdropping shall be done "in such a way as to minimize the interception of communications not subject to" the warrant. This admonition recognizes the statutory requirement of minimization contained in Section 700.30(7) of the CPL. *People* v. *Carter*, 81 Misc. 2d 345; 365 N.Y.S. 2d 964; *People* v. *Sturgis*, 76 Misc. 2d 1053 and *People* v. *Simmons*, 84 Misc. 2d 749.

The Courts jealously guard this burden of minimization and place the burden of proving same upon the

prosecution. *People* v. *Castania* 73 Mis. 2d 166; 340 N.Y.S. 2d 829; *People* v. *Kennedy*, 75 Misc. 2d 10; *People* v. *Pieri*, 69 Misc. 2d 1085; *aff'd* 41 A.D. 2d 1031; and *United States* v. *Austin*, 399. F. Supp. 698.

Likewise, the requirement of "sealing" as set forth in Section 700.50(2) has been held to be of paramount importance. See *People* v. *Sher*, 38 N.Y. 2d 600 and *People* v. *Nicoletti*, 34 N.Y. 2d 249. And as stated by Judge Jasen in the *Sher* case at page 603:

> "The sealing requirement was designed to prevent the abuse of wiretap recordings. To that end, as we held in *Nicoletti*, the requirement must be strictly construed. The burden is on the prosecution to establish due compliance with the statutory procedures."

It should also be kept in view that tape recorded conversations have a great potential for abuse and tampering and lend themselves to "diabolical fakery". *Lopez* v. *United States*, 373 U.S. 427, 468-69, Brennar, J., dissenting. Also see *People* v. *Blanda*, 80 Misc. 2d 79, 362 N.Y.S. 2d 735.

Since the prosecution has done nothing whatsoever to satisfy anyone that it has properly minimized, sealed and otherwise complied with the various provisions of Article 700 of the CPL, it is respectfully submitted that the following bill of particulars pertaining to same should be granted so that defendants may protect their rights.

a) Name and title of person who executed warrant as provided in Section 700.35(1) of CPL. This information is vital. See *People* v. *Losinno*, 47 A.D. 2d 534, 363 N.Y.S. 2d 834.

b) Copies of any progress reports made pursuant to Section 700.50(1).

c) Copy of return filed after execution of warrant.

d) Dates when recordings were sealed and set forth what instructions were given for sealing as set forth in Section 700.35(2).

e) State what custody arrangements were made for recordings as provided in Section 700.55(2).

f) When was report of issuance of warrant submitted to administrative office of the United States Court as provided in Section 700.60. Also supply copy of same to defendants.

g) State whether recording devices used herein were constantly manned or were voiced-activated and unattended.

VII — A BILL OF PARTICULARS OF THE INDICTMENT

In order to properly prepare a defense to the indictment herein, defendants demand a bill of particulars pursuant to Section 200.90 of CPL as follows:

A. AS TO THE CONSPIRACY

1) Where did Clark and Hill confer as alleged in overt act 1.

2) What were the figures they conferred on.

3) Where did Christine and Weldon confer as alleged in overt act 2.

4) Set forth copies of the policy records found in overt act 3.

B. AS TO THE PROMOTING

1) Describe the unlawful gambling activities it is claimed in count II which were committed by defendants.

2) State where these activities were committed, giving exact place and location.

3) State the exact date same were committed.

C. AS TO THE POSSESSION

1) State exact date such records were possessed.

2) State where they were possessed.

3) State whether active or constructive possession is claimed. If constructive, state how it is claimed they were possessed.

VIII — AS TO A DISCOVERY AND INSPECTION

It is respectfully submitted that pursuant to Section 240.20(1)(v) of the CPL, the Court must order discovery and inspection of:

"a written or recorded statement made by the defendant to a public servant engaged in law enforcement activity or a person then acting under his direction or in cooperation with him, which statement is within the possession, custody or control of the district attorney, and

is known by him to exist or should be the exercise of due diligence on his part become known to him to exist . . ."

Thus, it is respectfully submitted that the defendants are entitled as a matter of law and mandatory discovery to any written or recorded statements they may have made.

This Honorable Court is respectfully referred to *People* v. *Utley*, 77 Misc. 2d 86, which that the manner in which the defendant's oral statements had been written or recorded was immaterial on his motion for discovery. If they were summarized, abridged, referred to or reflected in any book, record or paper in the possession of law enforcement personnel, they were subject to discovery. *Utley, supra*, further held that the defendant, on a motion for discovery, was entitled to particulars of his oral statement which were not recorded or written, but were within the knowledge of law enforcement authorities and might well be used against him at trial.

As an added inducement, the defendants are willing for the Court to view *in camera* all notes and/or memoranda made by law enforcement officials pertaining to statements made by the defendants and to give the defendants only so much of such material as pertains to their statements.

It is respectfully submitted that Section 240.20 of the CPL applies with equal force to written, recorded or oral statement or to notes or memoranda made on oral statements whether made to a person directly engaged in law enforcement activity or to:

"...a person then acting under his direction or in cooperation with him..." CPL, Section 240.20(1)(b).

The test appears to be that as long as the statements are in the possession, custody or control of the District Attorney, and is known by him to exist or should by the exercise of due diligence on his part become known to him to exist, they should be furnished to the defense.

If conversations were held with an informant, the defense respectfully requests copies thereof whether inculpatory or exculpatory. The Supreme Court of the United States has held that this is a proper subject for mandatory discovery and is the "better practice". *Cicenia* v. *LaGay*, 357 U.S. 504.

The defense requests that the District Attorney clearly indicate whether or not a statement exists. This request is occasioned by the form used by the District Attorney's office which automatically covers statements, identification and asks for alibi information. This indiscriminate handing out of forms not only causes numerous motions to be made, but keep the defense up in the air. All too often a statement appears only at the last minute and during the trial. The relief sought forces the District Attorney to properly prepare his case, and resulting in the defense being given proper notice to the actual existence of any statement that the defendant is charged with having made.

The defense requests a list of all property seized from the defendants' person or other property allegedly belonging to the defendants is material and reasonable.

This request falls under the discretionary discovery area of Section 240.20(3) of the CPL. If the property were taken from the defendants or alleged to belong to them, it is not exempt property as defined in Section 240.10(3) of the CPL.

In order to prepare their defense, it is respectfully submitted the property with which the prosecution will allege connects the defendants with the crimes and was taken from them or alleged to belong to them should be disclosed. Section 240.20(3) of the CPL states:

"Subject to the provisions of subdivisions 4 and 5, such discovery may be ordered with respect to any property specifically designated by the defendant except exempt property, which is within the possession, custody or control of the district attorney upon a showing by the defendant that

(a) discovery with respect to such property is material to the preparation of his defense, and

(b) the request is reasonable."

Under the requested discovery and particularly pursuant to Section 700.50(3) of CPL, defendants are now entitled to receive copies of all surveillance records made pursuant to the aforesaid eavesdropping warrant issued on September 15, 1976, including but not limited to electronic recordings, tapes, transcripts, logs and any other memoranda made of the intercepted conversations.

Without such information, defendants will not be able to even test the legality or sufficiency of the evidence sought to be used by the prosecution at the ultimate trial of

the indictment. Furthermore, defendants cannot prepare defense for trial without this vital information.

All of this becomes even more important when it is realized that the prosecution has assembled information from conversations allegedly overheard of three defendants who are not named in the warrant or in the application for same. Since no other evidence will be presented at the trial, it would be grossly unfair to withhold same from the defendants at this point particularly in view of the fact that the prosecution obtained this evidence in the first instance from an *ex parte* warrant issued by the Court.

Beginning with the Supreme Court in *Alderman* v. *United States*, 394 U.S. 165, the New York courts have consistently held that defendants are entitled to such relief by discovery when dealing with the peculiar area of electronic bugging. See cases of *People* v. *Castania*, 73 Misc. 2d 166; 340 N.Y.S. 2d 829; *People* v. *Kennedy*, 75 Misc. 2d 10, 347 N.Y.S. 2d 327; *Application of Guilianelle*, 80 Misc. 2d 337, 363 N.Y.S. 2d 220 and *People* v. *Hueston*, 42 A.D. 2d 860, 347 N.Y.S. 2d 78.

IX — AS TO A HUNTLEY HEARING

The defense is contending that no statements, admissions and/or confessions were made by the defendants and that if they were made, the defendants were not advised of their rights under *Miranda* v. *Arizona*, 346 U.S. 436 at the time. If the People intend to introduce any such confession, admission and/or statement, the defense requests that this Court either suppress such statement, admission and/or confession or hold a hearing pursuant to *People* v. *Huntley*, 15 N.Y. 2d 72 prior to the admission of said statements, confessions and/or admission to determine their admissibility.

X — AS TO A WADE HEARING

The defendants have informed your affiant that they did not participate knowingly in any line-up. If the District Attorney intends to introduce any pre-trial identification testimony during the trial, the defense requests a hearing before trial to determine the admissibility of pre-trial identification, *United States* v. *Wade*, 388 U.S. 218.

Since the defendants contend that they did not participate knowingly in any line-up, any pre-trial identification must have come from an illegal show-up or photographic identification. Since the defendants contend any such pre-trial identification was in violation of their rights, they are asking for suppression of such identification under the authority of Section 710.20(5) of the CPL, or in the alternative, the defense requests a suppression hearing pursuant to CPL Section 710.60(4).

XI — AS TO BRADY MATERIAL

The defendants' request for material favorable to the defense is codified in Section 240.40 of the CPL. Under the doctrine of *Brady* v. *Maryland*, 373 U.S. 83, disclosure of all information favorable to the defense is mandated.

The New York Rules adopted from the Federal rule of Criminal Procedure No. 16 mandates disclosure of

exculpatory evidence. The defense under either rule is specifically seeking exculpatory material provided by persons who were questioned by the District Attorney's office or the Suffolk County Police Department. The defense is well aware that the People always take the position that they are cognizant of their duties to reveal *Brady* material, however, it is ironic that the People very seldom become aware of the existence of such material until the eve of trial. Therefore, the defense respectfully request that this Court direct the People to forthwith diligently search their files, contact their officials and witnessess, to determine if *Brady* material exists and if it does to immediately turn over such material to the defense.

XII — AS TO SANDOVAL HEARING

Defendant Christine Watkins has informed that in 1975 she was guilty of possession of gambling records and paid a fine in the sum of $1,000.00. She also stated that she had no other criminal convictions.

Defendant Willie Clark has informed me that although on May 24, 1971 he was charged with the crime of promoting gambling in the first degree, he was subsequently found not guilty of said charges. Likewise, although on May 30, 1973 he was charged with promoting gambling in the second degree, said charge was ultimately dismissed.

Willie Clark has also stated that he has no other arrests and never had been convicted of a crime.

Defendant Frederick Hill has informed me that he

has no criminal convictions. He also stated, however, that on October 1, 1976 he was charged with the crime of possession of gambling records in the first degree and that said case is open and pending. He has no other arrests.

Defendant Weldon Watkins has informed me that the following is a summary of his arrest record:

Date of arrest	Charge	Disposition
12/17/66	Possession of Policy	Dismissed.
2/2/67	Possession of Policy and Maintaining Place for Policy	Dismissed
5/9/67	Possession of Policy	$500. fine
5/9/67	Transporting gambling Paraphernalia	Dismissed
5/9/67	Forgery 2nd	Dismissed
2/28/69	Possession of Gambling records	$500. fine
5/12/69	Possession gambling records — first degree	Dismissed
7/8/69	Criminal Possession Dangerous Drug 2nd	Dismissed
1/70	Promoting gambling	$500. fine
3/12/71	Promoting Gambling	Dismissed
3/12/71	Possession Gambling Records	$1,000.00 fine
1/30/73	Promoting gambling 2nd	$500. fine
2/27/75	Possession Gambling Records	Dismissed
2/27/75	Promoting Gambling	Dismissed

Since the only convictions set forth in the foregoing records are for the same crimes now charged against defendants in this indictment and do not involve a predilection for dishonesty or mendacity, we are asking that the defendants' criminal records be suppressed.

Pursuant to the dictates of *People* v. *Sandoval*, 34 N.Y. 2d 371, each defendant is requesting a pre-trial hearing to determine whether or not the People will be permitted to cross-examine on any of the foregoing alleged crimes or any alleged prior bad acts if they take the stand to testify in their own defense. It is respectfully submitted that the People should be precluded from impeaching any defendant on their past record or prior bad acts if they testify in their own defense because the prejudice that will inure to them will far exceed the probative value of the impeachment attempt. It is further respectfully submitted that the aforesaid crimes do not involve those associated with honesty or veracity, nor do they show a callous disregard of the aims and goals of society. Therefore, the defense is asking in the alternative that the Court direct the District Attorney and prohibit him from using any prior crimes or alleged prior bad acts for impeachment purposes if any defendant takes the stand or in the alternative, directing a hearing to determine this issue.

XIII — AS TO AN AUDIBILITY HEARING

Pursuant to *Alderman* v. *United States* (394 U.S. 165) we are asking this Court to direct the district attorney to permit the defendants and their attorney to hear the intercepted communications to determine the audibility thereof. This will also eliminate the problems that may arise at trial as to voice identification and identity in

general. The defense agrees to conduct this audibility determination at the office of the district attorney or at such other place or at such times as the Court deems proper.

XIV — AS TO VOICE IDENTIFICATION

The defense is requesting the right to have an expert perform a spectographic analysis upon the tape recordings of the intercepted communications seized pursuant to the eavesdropping Order.

It is respectfully submitted that such analysis is reasonable and necessary for the proper preparation of the defense herein in that the evidence is solely within the possession of the People and voice identification analysis can absolve the defendants of participation in the alleged conspiracy. The defense will consent to the Court imposing such restrictions as to it deems necessary, however, it is requested that the tests be performed at such a place where the necessary testing equipment is available. I have spoken with Carl Abraham of Inter-City Testing and Consulting Corp. who informed me that the tests would take approximately two days and because of the size and volume of the equipment needed, would have to be conducted in New York City.

To minimize the cost to the People, the defense would consent to being provided with a copy of the original recordings limited to the conversations in which the four defendants herein allegedly took part in.

WHEREFORE, it is respectfully requested that the motion be granted in its entirety.

Dated: Suffolk, N.Y.
December 8, 1976

Stanley L. Shapiro

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

..... x

THE PEOPLE OF THE STATE OF NEW YORK

— against — AFFIDAVIT

CHRISTINE WATKINS, WELDON a/k/a COLE, a/k/a COLEMAN WATKINS, WILLIE CLARK and FREDERICK HILL, Indict. No. 1566/76

Defendants.

..... x

STATE OF NEW YORK)

SS.:

COUNTY OF SUFFOLK)

WELDON WATKINS, being duly sworn, deposes and says:

That I am one of the defendants herein and I make this affidavit in support of my Omnibus Motion herein.

That I have read my attorney's affirmation submitted herewith and do hereby ratify all the facts contained therein.

AS TO THE GRAND JURY MINUTES

Since this is purely a legal matter, and I have no information whatsoever concerning what went on at the

Grand Jury proceeding, I rely on my attorney's arguments presented herewith.

AS TO VACATING THE SEARCH WARRANT

I respectfully must rely on my attorney's affirmation as this concerns purely a legal matter of which I have no personal knowledge.

AS TO SUPPRESSION OF EVIDENCE SEIZED UNDER THE WARRANT

I respectfully submit that this is a legal matter again covered in my attorney's affirmation, however, I do state to the Court that there were no items removed from my physical possession at the time of my arrest.

AS TO THE DARDEN HEARING

Since this is purely a legal matter and I have no independent information, I will rely on my attorney's affirmation.

AS TO STATEMENTS

I respectfully submit that I did not make any statements to the police either oral or written. If I did make such statements, I respectfully submit to the Court that at the time of my arrest I was not advised of my rights under the Miranda warnings. I join in my attorney's application for a Huntley hearing.

AS TO PRE-TRIAL IDENTIFICATION

I respectfully submit that I did not knowingly participate in any line-up. My attorney informs me therefore that any pre-trial identification made of me as a perpetrator of a crime must have been in violation of my rights and I rely on my attorney's legal argument on this point.

AS TO DISCOVERY

My attorney advises me that this is purely a legal matter which he will cover in his Affirmation.

AS TO DISCOVERY AND INSPECTION OF GRAND JURY TESTIMONY

Again this is a legal matter of which I have no personal knowledge and my attorney will cover this in his Affirmation.

AS TO SANDOVAL

The following is my criminal record in Suffolk County:

Date	Charge	Sentence
12/17/66	Possession Policy	Dismissed
2/2/67	Possession Policy and Maintaining Place for Policy	Dismissed
5/9/67	Possession Policy	$500. fine
5/9/67	Transporting Gambling Paraphernalia	Dismissed

2/28/69	Possession Gambling Records	$500. fine
5/9/67	Forgery 2nd	Dismissed
5/12/69	Possession Gambling Records 1st	Dismissed
7/8/69	Criminal Possession Dangerous Drug 2nd	Dismissed
1/70	Possession Gambling Records 2nd	$500. fine
3/12/71	Promoting Gambling	Dismissed
3/12/71	Possession Gambling Records	$1,000.00 fine
1/30/73	Promoting Gambling 2nd	$500. fine
2/27/75	Promoting Gambling 1st	Dismissed
2/27/75	Possession Gambling Records	Dismissed

My attorney informs me that unless my previous record and other prior bad acts are suppressed that it would prohibit me from taking the stand since the prejudice that would inure to me, based on my past record, would far exceed the probative value of any testimony that I may give. I respectfully submit to the Court that unless my prior record is suppressed, I could not take the stand to testify in my behalf.

AS TO THE BILL OF PARTICULARS

Again this concerns a legal matter which is solely within the province of my attorney and the same is being covered in his Affirmation.

AS TO SUPPRESSION OF TANGIBLE PROPERTY, FRUITS, ETC.

Again these concern legal matters which are within my attorney's particular knowledge and I ratify the statements contained in his Affirmation.

AS TO SUPPRESSION OF IDENTIFICATION

I again rely on my attorney to cover this legal matter.

AS TO AN INDEPENDENT SOURCE HEARING

My attorney advises me that he will cover this in his Affirmation since this is purely a legal matter.

AS TO ROSARIO MATERIAL

I respectfully submit that this is a legal matter and will be covered by my attorney in his Affirmation.

AS TO BRADY MATERIAL

Again this is a legal matter and my attorney will cover this in his Affirmation.

I respectfully request that this Court grant me such other and further relief as it may in its wisdom deem just and proper.

WHEREFORE, I respectfully join in my attorney's affirmation and in the moving papers for the relief requested in the Notice of Motion.

Dated: Suffolk, New York

/s/ Weldon Watkins

Weldon Watkins

Sworn to before me this
8th day of December 1976.

/s/ Barbara Logan

BARBARA LOGAN
NOTARY PUBLIC, State of New York
No. 52-4633814 Suffolk County
Commission Expires March 30, 1978

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

..... x

THE PEOPLE OF THE STATE OF NEW YORK

— against —

AFFIDAVIT

CHRISTINE WATKINS, WELDON a/k/a COLE,
a/k/a COLEMAN WATKINS, WILLIE CLARK
and FRED HILL, Ind No. 1566/76

Defendants.

..... x

STATE OF NEW YORK)
SS.:
COUNTY OF SUFFOLK)

CHRISTINE WATKINS, being duly sworn, deposes and says:

That I am one of the defendants herein and I make this affidavit in support of my Omnibus Motion herein.

That I have read my attorney's affirmation submitted herewith and do hereby ratify all the facts contained therein.

AS TO THE GRAND JURY MINUTES

Since this is purely a legal matter, and I have no information whatsoever concerning what went on at the Grand Jury proceeding, I rely on my attorney's arguments presented herewith.

AS TO VACATING THE SEARCH WARRANT

I respectfully must rely on my attorney's affirmation as this concerns purely a legal matter of which I have no personal knowledge.

AS TO SUPPRESSION OF EVIDENCE SEIZED UNDER THE WARRANT

I respectfully submit that this is a legal matter, again covered in my attorney's affirmation, however, I do state to the Court that there were no items removed from my physical possession at the time of my arrest.

AS TO THE DARDEN HEARING

Since this is purely a legal matter and I have no independent information, I will rely on my attorney's affirmation.

AS TO STATEMENTS

I respectfully submit that I did not make any statements to the police either oral or written. If I did make such statements, I respectfully submit to the Court that at the time of my arrest I was not advised of my rights under the Miranda warnings. I join in my attorney's application for a *Huntley* hearing.

AS TO PRE-TRIAL IDENTIFICATION

I respectfully submit that I did not knowingly participate in any line-up. My attorney informs me therefore that any pre-trial identification made of me as a perpetrator of a crime must have been in violation of my rights and rely on my attorney's legal argument on this point.

AS TO DISCOVERY

My attorney advises me that this is purely a legal matter which he will cover in his Affirmation.

AS TO DISCOVERY AND INSPECTION OF GRAND JURY MINUTES

Again these concern legal matters which are within my attorney's particular knowledge and I ratify the statements contained in his Affirmation.

AS TO SANDOVAL

The following is my arrest record:

Date of Arrest	Charge	Disposition
1975	Possession of Gambling Records	$1,000. fine

I respectfully submit to the Court that I have no other arrests nor convictions. My attorney informs me that unless my previous record and other prior bad acts are suppressed that it would prohibit me from taking the stand since the prejudice that would inure to me, based on my past record, would far exceed the probative value of any testimony that I may give. I respectfully submit to the Court that unless my prior record is suppressed, I could not take the stand in my behalf.

AS TO THE BILL OF PARTICULARS

Again this concerns a legal matter which is solely within the province of my attorney and the same is being covered in his Affirmation.

AS TO SUPPRESSION OF TANGIBLE PROPERTY, FRUITS, ETC.

Again this concern legal matters which are within my attorney's particular knowledge and I ratify the statements contained in his Affirmation.

AS TO SUPPRESSION OF IDENTIFICATION

I again rely on my attorney to cover this legal matter.

AS TO AN INDEPENDENT SOURCE HEARING

My attorney advises me that he will cover this in his Affirmation since this is purely a legal matter.

AS TO ROSARIO MATERIAL

I respectfully submit that this is a legal matter and will be covered in my attorney's Affirmation.

AS TO BRADY MATERIAL

Again this is a legal matter and my attorney will cover this in his Affirmation.

I respectfully request that this Court grant me such other and further relief as it may in its wisdom deem just and proper.

WHEREFORE, I respectfully join in my attorney affirmation and the moving papers for the relief requested in the Notice of Motion.

Dated: Suffolk, New York.

/s/ Christine Watkins
Christine Watkins

Sworn to before me this
8th day of December 1976.

/s/ Barbara Logan

BARBARA LOGAN
NOTARY PUBLIC, State of New York
No. 52-4633814 Suffolk County
Commission Expires March 30, 1978

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

..... x

THE PEOPLE OF THE STATE OF NEW YORK

— against — AFFIDAVIT

CHRISTINE WATKINS, WELDON WATKINS, WILLIE CLARK and FREDERICK HILL

Indictment #1566/76

Defendants.

..... x

STATE OF NEW YORK)
SS.:
COUNTY OF SUFFOLK)

WILLIE CLARK, being duly sworn, deposes and says:

That I am one of the defendants herein and I make this affidavit in support of my Omnibus Motion herein.

That I have read my attorney's affirmation submitted herewith and do hereby ratify all of the facts contained therein.

AS TO THE GRAND JURY MINUTES

Since this is purely a legal matter, and I have no information whatsoever concerning what went on at the Grand Jury proceeding, I rely on my attorney's arguments presented herewith.

AS TO VACATING THE SEARCH WARRANT

I respectfully must rely on my attorney's affirmation as this concerns purely a legal matter of which I have no personal knowledge.

AS TO VACATING THE EAVESDROPPING WARRANT

I have also read the affidavit of Detective Jay Cseh, sworn to the 15th day of September 1976 and particularly the contents of pages 3, 4 and 5 thereof. The allegations on those three pages are false.

On September 11, 1976 at about 6:00 p.m. I did not on telephone instrument number 842-2184 discuss code numbers for collectors and/or runners, shortages, track and handles and hits for that day or any policy transactions at that time.

AS TO SUPPRESSION OF EVIDENCE SEIZED UNDER THE WARRANT

I respectfully submit that this is a legal matter, again covered in my attorney's affirmation, however, I do state to the court that there were no items seized from my physical possession at the time of my arrest.

AS TO THE DARDEN HEARING

Since this is purely a legal matter and I have no independent information, I will rely on my attorney's affirmation.

AS TO STATEMENTS

I respectfully submit that I did not make any statements to the police either oral or written. If I did make such a statement, I respectfully submit to the Court that at the time of my arrest I was not advised of my rights under the Miranda warnings. I join in my attorney's application for a *Huntley* hearing.

AS TO PRE-TRIAL IDENTIFICATION

I respectfully submit that I did not knowingly participate in any line-up. My attorney informs me, therefore, that any pre-trial identification of me as a perpetrator of a crime must have been in violation of my rights and I rely on my attorney's legal argument on this point.

AS TO DISCOVERY

My attorney will cover this in his Affirmation as it is purely a legal matter.

AS TO DISCOVERY AND INSPECTION OF GRAND JURY MINUTES

Again this is a legal matter of which I have no personal knowledge and my attorney will cover this in his Affirmation.

AS TO SANDOVAL

The following is my arrest record:

Date of Arrest	Charge	Disposition
5/24/71	Promoting Gambling first degree	Not Guilty
5/30/73	Promoting Gambling 2nd degree	Dismissed

I respectfully submit to the Court that I have never been convicted of any criminal act and have no other arrests. My attorney advises me that unless my previous record and other prior bad acts, if any, are suppressed that it would prohibit me from taking the stand since the prejudice that would inure to me, based on my past record, would far exceed the probative value of any testimony that I may give. I respectfully submit to the Court that unless my prior record is suppressed, I could not take the stand in my behalf.

AS TO THE BILL OF PARTICULARS

Again this concerns a legal matter which is solely within the province of my attorney and the same is being covered in his Affirmation.

AS TO SUPPRESSION OF TANGIBLE PROPERTY, FRUITS, ETC.

Again these matters concern legal matters which are within my attorney's particular knowledge and I ratify the statement contained in his Affirmation.

AS TO SUPPRESSION OF IDENTIFICATION

I again rely on my attoreny to cover this legal aspect.

AS TO AN INDEPENDENT SOURCE HEARING

My attorney advises me that he will cover this in his Affirmation since this is purely a legal matter.

AS TO ROSARIO MATERIAL

I respectfully submit that this is a legal matter and will be covered in my attorney's Affirmation.

AS TO BRADY MATERIAL

Again this is a legal matter and my attorney will cover this in his Affirmation.

I respectfully request that this Court grant me such other and further relief as it may in its wisdom deem just and proper.

WHEREFORE, I respectfully join in my attorney's affirmation and the moving papers for the relief requested in the Notice of Motion.

Dated: Suffolk, New York

/s/ Willie Clark
Willie Clark

Sworn to before me this
8th day of December 1976.

/s/ Barbara Logan

BARBARA LOGAN
NOTARY PUBLIC, State of New York
No. 52-4663814 Suffolk County
Commission Expires March 30, 1978

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

..... x

THE PEOPLE OF THE STATE OF NEW YORK

— against —

CHRISTINE WATKINS, WELDON WATKINS, WILLIE CLARK and FREDERICK HILL,

Defendants.

..... x

STATE OF NEW YORK)
SS.:
COUNTY OF SUFFOLK)

FREDERICK HILL, being duly sworn, deposes and says:

That I am one of the defendants herein and I make this affidavit in support of my Omnibus Motion herein.

That I have read my attorney's affirmation submitted herewith and do hereby ratify all of the facts contained therein.

AS TO THE GRAND JURY MINUTES

Since this is purely a legal matter, and I have no information whatsoever concerning what went on at the Grand Jury proceeding, I rely on my attorney's arguments presented herewith.

AS TO VACATING THE SEARCH WARRANT

I respectfully must rely on my attorney's affirmation as this concerns purely a legal matter of which I have no personal knowledge.

AS TO SUPPRESSION OF EVIDENCE UNDER THE WARRANT

I respectfully submit that this is a legal matter, again covered in my attorney's affirmation, however, I do state to the Court that there were no items removed from my physical possession at the time of my arrest.

AS TO THE DARDEN HEARING

Since this is purely a legal matter and I have no independent information, I will rely on my attorney's affirmation.

AS TO STATEMENTS

I respectfully submit that I did not make any statements to the police either oral or written. If I did make such statement, I respectfully submit to the Court that at the time of my arrest I was not advised of my rights under the Miranda warnings. I join in my attorney's application for a *Huntley* hearing.

AS TO PRE-TRIAL IDENTIFICATION

I respectfully submit that I did not knowingly participate in any line-up. My attorney informs me therefore that any pre-trial identification made of me as a perpetrator of a crime must have been in violation of my rights and I rely on my attorney's legal argument on this point.

AS TO DISCOVERY

My attorney advises me that this is purely a legal matter which he will cover in his Affirmation.

AS TO DISCOVERY AND INSPECTION OF GRAND JURY MINUTES

Again this is a legal matter of which I have no personal knowledge and my attorney will cover this in his Affirmation.

AS TO SANDOVAL

The following is my arrest record:

Date of Arrest	Charge	Disposition
10/1/76	Possession of gambling records 1st	Open

I respectfully submit to the Court that I have no other arrests nor convictions. My attorney informs me that unless my previous record and other prior bad acts, if any, are suppressed that it would prohibit me from taking the stand since the prejudice that would inure to me, based on my past record, would far exceed the probative value of any testimony that I may give. I respectfully submit to the Court that unless my prior record is suppressed, I could not take the stand in my behalf.

AS TO THE BILL OF PARTICULARS

Again this concerns legal matters which are solely within the province of my attorney and the same is being covered in his Affirmation.

AS TO SUPPRESSION OF TANGIBLE PROPERTY

Again these matters concern legal questions within the province of my attorney and the same is being covered in his Affirmation.

AS TO SUPPRESSION OF TANGIBLE PROPERTY, FRUITS, ETC.

Again this is a legal matter and my attorney will cover this in his Affirmation.

AS TO SUPPRESSION OF IDENTIFICATION

I again rely on my attorney to cover this in his Affirmation.

AS TO AN INDEPENDENT SOURCE HEARING

My attorney advises that he will cover this in his Affirmation since this is purely a legal matter.

AS TO ROSARIO MATERIAL

I respectfully submit that this is a legal matter and will be covered in my attorney's affirmation.

AS TO BRADY MATERIAL

Again this is a legal matter and my attorney will cover this in his Affirmation.

I respectfully request that this Court grant me such other and further relief as it may in its wisdom deem just and proper.

WHEREFORE, I respectfully join in my attorney's Affirmation and the moving papers for the relief requested in the Notice of Motion.

Dated: Suffolk, N.Y.

/s/ Frederick Hill
Frederick Hill

Sworn to before me this
8th day of December 1976.

/s/ Barbara Logan

BARBARA LOGAN
NOTARY PUBLIC, State of New York
No. 52-4633814 Suffolk County
Commission Expires March 30, 1978

CRIMINAL

SUPREME COURT, SUFFOLK COUNTY

TERM, PART II

THE PEOPLE OF THE STATE OF NEW YORK

VS.

CHRISTINE WATKINS, WELDON WATKINS, WILLIE CLARK and FREDERICK HILL,

Defendants

BY JOSEPH JASPAN, J.S.C.

DATED February 28, 1977

Ind. #1566-76

Hon. Henry F. O'Brien
District Attorney of Suffolk County
Donald Sullivan, Esq. of Counsel
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11787

Shapiro and Somer, Esqs.
Attorneys for Defendants
Stanley Shapiro, Esq. of Counsel
1557 Straight Path
Wyandanch, New York 11798

I., II. and III. The Court has examined the minutes of the Grand Jury proceedings and finds that the evidence presented therein legally sufficient to support the indictment. The instructions given by the District Attorney were adequate and sufficient. The cases cited by the defendants do not lead to a contrary conclusion, notwithstanding the fact that the jury was not advised that they may reject opinion evidence given as to the meaning of words used in conversations and as to the nature of substance thereof. The integrity of the proceedings was not impaired by this failure to give a legal instruction and the defendants were not prejudiced thereby. C.P.L. 210.35(5);

People v. Percy 45 A.D. 2d 284, 358 N.Y.S. 2d 434. The import of the evidence before the Grand Jury was clear and sufficiently sustains the indictment *(People v. Rallo* 46 A.D. 2d 518, 363 N.Y.S. 2d 581, 860) without the additional instructions.

IV. and V. The warrant authorized the prosecution to intercept "Communications of Willie J. Clark and his confederates, occuring over telephone instrument number (516) 842-2184".

The defendants have challenged the use of the word "confederates", alleging that there is no legal definition of that word in the C.P.L. and that it is generally ambiguous and not capable of proper execution, rendering the warrant void.

In this connection, the defendants also claim that the identities of Weldon Watkins, Christine Watkins and Fred Hill were known to the police at the time the application was made for the warrant, and that their names should have been included in the application and in the warrant. It should be noted that the phone intercepted was assigned to the defendant Willie J. Clark and not to the other defendants. It was his calls to and from his telephone which were to be intercepted.

In *People v. Zorn* 38 A.D. 2d 359, 329 N.Y.S. 2d 592, aff'd 31 N.Y. 2d 134, 335 N.Y.S. 2d 257, cert. den. 410 U.S. 943, 93 S.Ct. 1373, 35 L.Ed. 2d 610, the Court held that where there was probable cause to sustain a warrant with respect to the named individual, the warrant was also sustained with respect to conversations with all persons with whom the named individual conversed on the subject of crimes

specified in the warrant. The Court further stated that it was not necessary to name in the warrant the persons with whom the named individual had conversations with respect to the crimes.

In *United States v. Moore* 513 F. 2d 485, cited by the defendant, the Court stated that it was not necessary to name the other individuals where they are also being investigated for criminal activity as well.

I conclude tht the use of the word "confederate" is not improper.

The defendants have also attacked the warrant itself, claiming that it does not meet the requirements of cases such as *Aquilar v. United States* 378 U.S. 108; *Spinelli v. United States* 393 U.S. 410, and their progeny, in that there was an insufficent demonstration of the reliability of the unnamed informant.

The unnamed informant is alleged to have provided previous information leading to the arrest of a named individual for gambling violations; that he informed the police in that case where gambling records would be found, and they were in fact found there; and that he had provided information as to the movements of certain individuals known to be policy operators. In addition, the applicant, a police officer with considerable gambling squad experience, legally listened in on a conversation between the informant and Willie Clark during a phone call made to the number sought to be widetapped, and provided thereby independent verification of the informant's information.

In *People v. Hanlon* 36 N.Y. 2d 549, the informant

provided information leading to the arrests of three individuals, although convictions had not yet resulted. The information was held to be sufficient to uphold the warrant because the police observations acted after independent verification of the information supplied. See also *People v. Slaughter* 37 N.Y. 2d 601.

I conclude that there was a sufficient basis for crediting the information provided by the informant. His reliability was established and the reliability of his information was independently verified by the police.

Constitutionality

The defendant has also attacked the constitutionality of C.P.L. § 700.20 (2) (iv). The Court notes that there is a strong presumption of constitutionality attached to any legislative enactment. (*Wasmuth v. Allen* 14 N.Y. 2d 391). Additionally, the constitutionality of Article 700 of the C.P.L. was upheld by the U.S. Court of Appeals, 2nd Cir., in *United States v. Cirillo* 499 F. 2d 872.

The Court denies the motion to declare the section unconstitutional.

VI. The defendants' request for a bill of particulars as to the execution of the eavesdropping warrant is denied. The defendants have had an audibility hearing and have listened to all of the tapes.

VII. Bill of Particulars

As to the Conspiracy—

1. Granted.

2. District Attorney to state whether the figures referred to in the conversation, if any, represented more than $500.00 of policy plays in any one day and whether it represented more than 500 plays therein.

3. Granted.

4. Defendants may inspect property in the possession of the District Attorney which was seized in connection with this case.

As to Promoting Gambling in the First Degree—

1. Denied as evidentiary. The indictment sets forth the pertinent information.

2. State central location or locations at which the gambling activities were conducted.

3. District Attorney to state the period of time during which it is alleged the illegal gambling activities were conducted.

As to Possession of Gambling Records in the First Degree—

1. District Attorney to state the date of possession, or if it is alleged that such possession took place over a period of time, the District Attorney is to set forth the durational period involved.

2. Granted.

3. Denied.

VIII. Discovery

a. District Attorney to provide the exact words of any alleged oral statements, or if that is not available, to set forth the substance thereof.

b. Defendants' request for copies of statements, oral or written, made to informants is granted where they involve informants acting for the police.

c. Defendants may inspect property in the possession of the District Attorney which was seized in connection with this case.

d. District Attorney shall provide duty logs kept by officers monitoring the wiretaps. The tapes have been shown to and played for the defendants. Transcripts need not be provided at this time. However, it would serve the convenience of all parties if the defendants could conform the transcripts to the recorded conversation in advance of the trial.

IX. Defendants' motion for a Huntley hearing is granted. The hearing will take place prior to trial at a time convenient to the Court and counsel.

X. Wade Hearing

Denied as moot in view of the District Attorney's representation that no identification procedures were engaged in.

XI. The District Attorney is directed to comply with the mandate of *Brady v. Maryland* 373 U.S. 83. Upon re-

quest, the Court will conduct an inspection of the District Attorney's file to determine whether there is any Brady material therein.

XII. A Sandoval hearing will be held immediately prior to trial.

XIII. Audibility hearings have been conducted. Therefore this portion of the defendants' motion is denied as moot at this time.

XIV. Voice Identification

The defendants' request for a spectrographic analysis upon the tape recordings of the intercepted communications is granted provided however that it shall be conducted at a place and time suitable to the District Attorney, the details of which shall be the subject of a special unsealing order to be issued by this Court. The granting of this relief does not constitute a ruling that such evidence is admissible in the absence of satisfactory proof as to its reliability.

This memorandum shall constitute the order of the Court.

/s/ Joseph Jaspen

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK: CRIMINAL PART

x

THE PEOPLE OF THE STATE OF NEW YORK

— against — SUPPLEMENTAL MOTION

CHRISTINE WATKINS, WELDON WATKINS, WILLIE J. CLARK and FREDERICK HILL,

Ind. #1566/76

Defendants.

x

SIR:

PLEASE TAKE NOTICE that upon the annexed affirmation of Stanley L. Shapiro, Esq., duly affirmed the 18th day of February 1977 and all the proceedings previously had herein, the undersigned will move this Court at a stated Motion Term before the Honorable Joseph Jaspan in the Supreme Court, H. Lee Dennison Building, Veterans Memorial Highway, Hauppauge, New York on the 1st day of March 1977 at 9:30 A.M., or as soon thereafter as counsel can be heard, for an Order pursuant to Article 710 of the Criminal Procedure Law suppressing all intercepted telephonic communications between defendants Christine Watkins and Weldon Watkins, originating on telephone instrument number 842-2184 under eavesdropping warrant signed by Honorable Thomas Stark on September 15, 1976, and for a further Order of discovery pursuant to Article 240 of the Criminal Procedure Law directing the District Attorney of Suffolk County to deliver the stenographic transcripts made of

the aforesaid intercepted telephonic communications to the undersigned and for such other and further relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, must be served upon the undersigned within five (5) days of the return date of the instant motion.

Dated: Wyandanch, N.Y.
Febuary 18, 1977

Yours, etc.

SHAPIRO & SOMER, Esqs.
Attorneys for Defendants
Office & P.O. Address:
P.O. Box 128 -
1557 Straight Path
Wyandanch, N.Y. 11798

TO:
Clerk, Supreme Court

District Attorney
Suffolk County -
Rackets Bureau
Hauppauge, N.Y. 11787

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

..... x

THE PEOPLE OF THE STATE OF NEW YORK

— against — AFFIRMATION

CHRISTINE WATKINS, WELDON WATKINS
WILLIE J. CLARK and FREDERICK HILL,

Ind. #1566/76

Defendants,

..... x

STATE OF NEW YORK)
SS.:
COUNTY OF SUFFOLK)

STANLEY L. SHAPIRO, an attorney at law, duly admitted to practice in the State of New York, respectfully affirms under the penalty of perjury:

That on September 15, 1976 the Honorable Thomas Stark, Justice of this Court, signed a warrant permitting the district attorney to intercept telephonic communications originating from telephone instrument bearing number 842-2184 at the home of defendant Willie J. Clark, he being the only named individual in said Order.

This motion could not be made any sooner since the audibility hearing for the intercepted communications was held only last week.

Defendants Christine Watkins and Weldon Watkins are husband and wife living together for a long period of time.

After hearing the telephonic intercepts as aforesaid, I learned for the first time that the prosecution is in possession of several telephone conversations between Christine Watkins and Weldon Watkins, hereinafter respectively referred to as "Wife" and "Husband". The prosecution has also indicated that these conversations will be introduced into evidence at the time of trial. Accordingly, this motion is being made to suppress those conversations and also to obtain a copy of the typewritten transcripts of said conversations.

The suppression branch of the motion is being made pursuant to Article 710 of the Criminal Procedure Law ("CPL") while the discovery branch is under Article 240.

At the audibility hearing, the district attorney produced typewritten transcripts of the telephone conversations in issue. Although he permitted me to look at such transcripts, he did not permit me to retain copies of same. It is respectfully indicated to the Court that the copies of these transcripts are now required for accuracy in examining the language of the conversations being objected to by this Motion. Accordingly, it is respectfully submitted that the Court also permit discovery of such transcripts by directing the district attorney to deliver copies of same to me as attorney for the defendants.

WHEREFORE, it is respectfully requested that the Motion be granted in its entirety.

Dated: Suffolk, N.Y.
February 18, 1977

/s/ Stanley L. Shapiro

Stanley L. Shapiro

ORDER DENYING SUPPLEMENTAL MOTION

SUPREME COURT Justice Jaspan,

People v. WELDON WATKINS—The defendants, Weldon Watkins and Christine Watkins, husband and wife move before trial to suppress intercepted telephone conversations between them upon the ground that the same is privileged because of their marital relationship.

The issue raised could be more easily determined after an offer of proof during the course of a trial at which time the court could consider such other relevant issues as the possible presence of third persons, the location and purpose of the telephone which was not listed in the name of either movant, whether the defendants or either of them intended to transmit the essence of the communication to an alleged co-conspirator or some other person and the signficance of the words used in the context and time sequence of the transactional events.

I am therefore withholding any ruling upon admissibility until the testimony is offered at the trial. However, two issues inherent in the motion can be resolved at this time.

1. Would the introduction of the taped conversations constitute nonconsensual testimony by the respective spouses as against each other?

2. Does the marital privilege extend to conversations advancing on-going criminal activities by both husband and wife as distinguished from an admission or confession by one to the other?

The movants and two others are charged in an indictment with conspiracy in the third degree, a class A misdemeanor, and with acting in concert and in aid of each other with respect to the substantive crimes of promoting gambling in the first degree and possession of gambling records in the first degree, class E felonies.

The evidence against the defendants was apparently divulged in a significant measure through the use of a court-approved eavesdropping warrant permitting an intercept of telephone communications originating from a designated instrument at the home of the defendant Clark. No challenge is presently before the court with respect to the warrant or the manner in which it was executed. At an audibility hearing, defense counsel became aware of the subject conversations and thereafter instituted this motion to suppress.

CPLR 4502 (subd [b]) applies to criminal as well as civil matters and reads as follows: "Confidential Communication Privileged. A husband or wife shall not be required, or, without the consent of the other if living, allowed, to disclose a confidential communication made by one to the other during marriage."

The privilege extends to "more than mere oral communications or conversations between husband and wife. It includes knowledge derived from observance of disclosive acts done in the presence or view of one spouse by the other because of the confidence existing between them by reason of the marital relation and which would not have been performed except for the confidence so existing" (*People v Daghita*, 299 NY 194, 198-199) and may even consist of letters between the parties (*People v Truck*, 170 NY 203, 214, 63 N.E. 281).

DO THE INTERCEPTED CONVERSATIONS CONSTITUTE TESTIMONY?

A relevant concern on this motion is CPL 700.20 (subd 2, [c]) which provides that an ex parte application for an eavesdropping warrant must contain. "(c). A statement that such communications are not otherwise legally privileged".

The obvious import of this statutory provision is that privileged communications may not be intercepted and if this minimization requirement is not observed, the ensuing conversations and information derived therefrom may not be used as part of the evidence-in-chief by the People.

In addition, I hold that the privilege would in any event extend to intercepted telephone communications. To conclude otherwise would be to approve intrusions upon the most private of conversations and expose those confidences which are exchanged only because of the trust, confidence and loyalty between the marital partners. Such a result would be contrary to public policy.

PRIVILEGE AS TO CRIMINAL ACTIVITY

Does privilege exist as to conversations between married persons which advance a criminal activity? I hold that it does not.

There are no reported cases in this State dealing directly with the issue, but there are other precedents and striking analogies which support that conclusion.

In Texas and Kentucky it has been held that when a husband and wife are coconspirators or when evidence justifies such a conclusion, a declaration of the husband or wife at the time of the act in question is not privileged. (*Goforth v State*, 273 SW 845, 100 Tex Cr Rep 442; *Thompson v State*, 178 SW 1192, 77 Tex Cr 417; *Gill v Commonwealth*, 374 SW2d 848, 851 [Ky]).

In *United States v Kahn* (471 F2d 191, reversed on other grounds 415 US 143) the court, *en banc*, was presented with facts almost identical with those found in this case. A court authorized wiretap in connection with an investigation of gambling activities intercepted a conversation between spouses relating to the commission of a crime. In reversing a District Court order suppressing the conversation, the court wrote (pp 194-195): "We agree with the government. If the intercepted conversations had to do with the commission of a crime and not with the privacy of the Kahn marriage, the judge's ruling is erroneous. Society has an interest in protecting the privacy of marriage because invasion of the privacy endangers the family relationship. The privilege has been interpreted in some jurisdictions to exclude conversations between spouses about business, since their role as spouses is merely incidental. That rule reinforces the exception to the privilege; "[w]here both spouses are substantial participants in patently illegal activity, even the most expansive of the marriage privileges should not prevent testimony. . . . We realize that "the law of evidence has demonstrated a degree of solicitude toward the intimacy of marriage not manifested with regard to other protested relationships," but the conversations before us between the Kahns were with respect to ongoing violations of Illinois gambling laws. We hold therefore that the judge erred in suppressing those conversations."

Kahn is predicated in part upon the prevalent rule in attorney-client relationships.

In this State it has been held that the attorney-client privilege does not extend to communications with respect to current or future criminal activities. (*People ex rel. Vogelstein v Warden of County Jail*, 150 Misc 714, 270 N.Y.S. 362, affd 242 App Div 611, 271 N.Y.S. 1059; *People v Farmer*, 194 NY 251, 269.)

In *Farmer* the Court of Appeals included a telling sentence from which it might be concluded that rules governing attorney and client relationships pertain in this area to marital confidences. It wrote (p 269): "The seal of personal confidence can *never* be used to cover a transaction which is in itself a crime." (Emphasis added.)

The use of the word *"never"* cannot be regarded as an accident of phraseology. It is true that the relationship between attorney and client is of limited duration and purpose and can be thus distinguished from the marital relationship. But the public policy which militates against suppression of discussions of on-going crimes should and does embrace both and limits the privilege.

An analogy may also be drawn with respect to the discussions between spouses as to ordinary business matters. Our courts have held such discussions are not privileged. (*Parkhurst v Berdell*, 110 NY 386 , 18 N.E. 123; *Morris v Lee*, 136 App Div 685, 121 N.Y.S. 512; *Johnson v Johnson*, 25 AD2d 672, 268 N.Y.S. 2d 403).

It could be argued that this rule should not apply to illegal business matters since such activities uniquely depend upon a measure of secrecy and confidence between the married coconspirators.

But such reasoning would require a finding that the joint participation of a husband and wife in the commission of a crime would protect and strengthen the marital bond. Such a conclusion cannot be justified by experience or public policy. The marriage vows are not founded on such a premise.

Accordingly, I find that the privilege does not extend to communications between spouses in which they are jointly advancing a criminal conspiracy or aiding each other in the commission of an on-going crime.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 26, 1978

HON. VITO J. TITONE
HON. JOSEPH A. SUOZZI
HON. CHARLES MARGETT
HON. JOSEPH F. HAWKINS *Associate Justices*

The People of the State of New York,

Respondent,

Weldon Watkins, a/k/a "Cole", a/k/a "Coleman", and Christine Watkins,

Appellants.

Order of Appeals from Judgments of Conviction

In the above entitled action, the above named Weldon Watkins, a/k/a "Cole", a/k/a "Coleman", and Christine Watkins, defendants in this action, having appealed to this court from two judgments (one as to each of them) of the Supreme Court, Suffolk County (JASPAN J.), both rendered June 22, 1977, convicting each of them of promoting gambling in the first degree and, in addition, convicting Christine Watkins of possession of gambling records in the first degree, upon a jury verdict, and imposing sentence; the said appeals also bring up for review the denial of defendants' motions to suppress certain intercepted telephone conversatons, and the said appeals having been argued by Stanley L. Shapiro, Esq., of counsel for the

appellants, and argued by Frederick Eisenbud, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof; it is:

ORDERED that the judgments appealed from are hereby unanimously affirmed and the case is hereby remitted to the Supreme Court, Suffolk County, for further proceedings pursuant to CPL 460.50 (subd. 5).

Enter:

Clerk of the Appellate Division

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

CERTIFICATE DENYING LEAVE

against

WELDON WATKINS a/k/a "Cole", a/k/a "Coleman" and CHRISTINE WATKINS

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,° there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
July 6, 1978

/s/ Sol Wachtler

Associate Judge

°Description of Order: Judgment of Supreme Court, Suffolk, June 22, 1977; affirmed by Appellate Division, Second Department, June 27, 1978.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on July 19, 1978

HON. VITO J. TITONE, Justice Presiding
HON. JOSEPH A. SUOZZI
HON. CHARLES MARGETT
HON. JOSEPH F. HAWKINS *Associate Justices*

..... x

The People, etc.,

Respondent,

v. Order

Weldon Watkins, a/k/a "Cole", a/k/a "Coleman" and Christine Watkins,

Appellants.

..... x

In the above entitled action, the above named Weldon Watkins, a/k/a "Cole", a/k/a "Coleman", and Christine Watkins, defendants, having appealed to this court from two judgments (one as to each of them) of the Supreme Court, Suffolk County, both rendered June 22, 1977; and by order of this court dated June 26, 1978 said judgments appealed from were unanimously affirmed and the case remitted to the Supreme Court, Suffolk County, for further proceedings pursuant to CPL 460.50 (subd. 5), the defendants move for a stay of execution of thirty days (30) of the sentences imposed on each of the said defendants pending an application to the Supreme Court of the United States for a Writ of Certiorari;

Now, upon the papers filed in support of and in opposition to the motion; and the motion having been duly submitted and due deliberation having been had thereon; it is

ORDERED that the motion is hereby denied. The temporary stay of execution contained in the order to show cause, dated July 8, 1978, is vacated and the defendants are directed to surrender to the Supreme Court, Suffolk County, in order that they may commence or resume the service of their sentences imposed on each on June 22, 1977.

Enter:

Clerk of the Appellate Division

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

August 3, 1978

Stanley L. Shapiro, Esquire
Shapiro, Somer & Wand
6080 Jericho Turnpike
Commack, New York 11725

Re: Weldon Watkins, et ux. v. New York
A-133

Dear Mr. Shapiro:

Your application for stay in the above-entitled case has been presented to Mr. Justice Marshall, who has endorsed thereon the following:

"Application — Denied
Thurgood Marshall
8/2/78"

Very truly yours,

MICHAEL RODAK, JR., CLERK

By

Francis J. Lorson
Deputy Clerk

th
cc: Donald Sullivan, Esquire
Asst. District Attorney, Suffolk County
H. Lee Dennison Building, Veterans Memorial Highway
Hauppauge, New York

DIRECT EXAMINATION BY MR. ARANEO (continued):

Q Again I ask the question: Did you recognize the voice of Christine Watkins on the tape and during the course of interception that night, October the 4th?

A Yes.

Q Did you recognize the voice of Weldon Watkins on any of those calls intercepted?

A Yes.

MR. ARANEO: At this time, Your Honor, the People offer the tape into evidence as People's 1 in Evidence.

MR. SHAPIRO: Your Honor, I would object to the introduction of the tape, all portions of the tape other than that portion of the tape allegedly identified by this officer as Christine or Weldon Watkins. That conversation I have no objection to, if it so exists.

MR. ARANEO: May we approach the bench, Your Honor?

THE COURT: Bring your machine around.

(Whereupon a side-bar conference ensued, outside the hearing of the jury, as follows:)

monitored prior?

A Yes.

Q Did you, in fact, monitor conversations that evening?

THE COURT: Did you follow the same procedure you did on October 4th?

THE WITNESS: Yes, Your Honor.

THE COURT: All right.

MR. SHAPIRO: Stipulated, reserving my right to cross-examine.

THE COURT: Yes, surely.

Q During the course of your monitoring and copying, did the voice of Christine Watkins appear on that tape?

A Yes.

Q And did the voice of Weldon Watkins appear on that tape and on the interception?

A Yes.

MR. SHAPIRO: Note my objection to his identification of the voice as never having heard them over the phone.

THE COURT: Well, he has identified it, and how strong that identification is is a

Morro—cross

Q You never spoke to her on the telephone?

A No.

Q Now, you said you spoke to Weldon Watkins on two occasions, is that correct?

A Yes.

Q When did you speak to Weldon Watkins?

A The same—You know, 1975. In the early part of '75 and later on. I don't really remember.

Q How long before October 4th of 1976 did you speak to Weldon Watkins?

A Five, six months. I don't know. I don't really recall.

Q And during this time period, how long were these conversations with Christine and with Weldon?

A Conversations with Christine, I'd say approximately three hours.

Q Over a three-hour period?

A Over a three-hour period.

Q You didn't speak to her for three hours solid, did you?

A No.

Q Approximately how much time over that three-hour

Hoge—direct

A Yes, I did.

Q And approximately how many times?

A Quite a few times. Fifteen or twenty times over the past twelve years.

Q Were these in-person conversations, or were they telephone conversations, or what?

A Both.

Q While you were intercepting those telephone calls on the 8th, did you hear Weldon Watkins' voice?

A Yes, I did.

Q Prior to October the 8th, did you ever have the opportunity to speak to Christine Watkins?

A Yes, I did.

Q Approximately how many times?

A Only once that I can recall.

Q Was that an in-person conversation or telephone?

A Yes, it was.

Q In person?

A Yes, in person.

Q And, to your knowledge, while you were intercepting those phone calls on October the 8th, did Christine Watkins' voice appear?

A Yes.

Q Can you tell us, please, what you did with the recording of the conversations that you intercepted the evening of October the 8th, 1976?

A Well, when I took it off, I initialed it, and dated it, made a copy of it and placed it in the safe.

Q When you made a copy of it, were you able to hear the original tape as you made the copy?

A Yes.

Q Did that tape fairly and accurately reflect the conversations that you actually intercepted that evening, October the 8th?

A Yes, it did. Yes, sir.

Q Fine.

MR. ARANEO: Could I see the box, please?

MR. SHAPIRO: Judge, in the interest of saving time, being this was part of the sealed evidence before Justice Stark, if Mr. Araneo wants to introduce the tape—

MR. ARANEO: I'd like the witness to identify it to make sure we have the right

A Yes, it is.

MR. ARANEO: All right. At this time the People would offer that transcript as a Court Exhibit.

MR. SHAPIRO: Subject to the same limitations, Judge. No problem.

THE COURT: Yes.

(A transcript was received and marked as Court Exhibit No. 4.)

MR. ARANEO: Thank you. I have no further questions.

CROSS-EXAMINATION BY MR. SHAPIRO:

Q Sergeant Hoge, when was the last time you spoke to Weldon Watkins on the telephone?

A Approximately about four years ago.

Q You have not spoken to him on the phone in four years, is that correct?

A That's correct.

Q And when was the last time you spoke to him in person?

A This morning.

Q And when you spoke to him this morning, how long

Hoge—cross

Q And in the year preceding the arrest, how many times did you speak with him?

A I don't think I talked to him that preceding year.

Q What, if anything, did you do with the tapes to identify the voice of Weldon Watkins?

MR. ARANEO: Objection, Your Honor.

THE COURT: If you're suggesting again, sir, that there has been some scientific tests, it's excluded. The courts do not permit the introduction into evidence of these voice tests. They have not achieved a scientific certainty which permits them to be used in court.

Q When you identified the voices, was anyone present with you?

A Wasn't necessary.

THE COURT: Was anyone else present?

THE WITNESS: When I identified the voices? No.

Q Did you observe or were you able to observe who was physically on the phone at the time that the calls were made?

Cseh—direct

A Numerous times from approximately 1969 to the present day.

Q And were these conversations person-to-person conversations or other types of conversations?

A Person-to-person and by phone.

Q By phone?

A Yes.

Q Approximately how many times did you speak with Weldon Watkins on the phone prior to October 5th?

A I would say several times. I can't recall exactly.

Q How about Christine Watkins? Did you ever have the occasion to speak to her prior to October 5th?

A Yes, I have.

Q Approximately how many times?

A Approximately four or five times, I believe. Somewhere in that area.

Q Did you ever speak to her by telephone?

A Yes, I have.

Q When you intercepted your telephone conversa-

tions on October the 5th and October the 6th, 1976, did Christine Watkins' voice appear on both of those days?

A Yes, it did.

Q And Weldon Watkins' voice?

A Yes, it did.

Q I would now like to draw your attention specifically to the date of October the 8th, 1976. Were you working that day as a detective, Suffolk County detective?

A Yes, I was.

Q Can you tell me, please, what tour of duty you worked that day?

A The night tour, I believe.

Q And did you have a particular assignment that evening?

A Yes, I did.

Q Can you tell us what that assignment was?

A The execution of a search warrant.

Q Did you, in fact, execute the warrant?

A Yes, I did.

Q Can you tell us the location?

A 19 Booker Boulevard, North Amityville.

Q And did you physically have the search warrant with you?

A Yes, I did.

Q Did you make an application for that search warrant?

looking for on the 5th of October would be Call No. 10.

Q Detective Cseh, did you recognize the voice of the female on that particular call?

A Yes, I did.

Q And whose voice did you recognize it to be?

A It was Christine Watkins.

Q And the male?

A Was Weldon Watkins or Coleman.

Q Did you have an opportunity to analyze this particular phone call?

A Yes, I did.

Q Would you, at this point, give us your opinion as to the contents of that particular phone call as it relates to a policy scheme?

A All right. She informed him—She told him, "You had a rough day today," meaning he got hit quite a bit. They had—

MR. SHAPIRO: Objection, Your Honor. That's speculation. That isn't an opinion. That's not necessarily totally related to policy.

Cseh—direct—voir dire

dire?

THE COURT: Yes.

VOIR DIRE BY MR. SHAPIRO:

Q You're basing this solely on the tapes, Officer Cseh, and nothing else?

A I'm basing what solely on the tapes?

Q Your opinion as to Weldon Watkins being the boss, solely and on nothing else?

A Yes.

THE COURT: Based on your experience?

THE WITNESS: My experience, in addition to.

Q No other information from anyone else?

A No, sir.

Q Not from street sources, not from other investi-

gators or anything else, just what you heard on those tapes, is that correct?

A That's correct, and my experience.

THE COURT: Well, sir, isn't it a fact that you knew at the time you were investigating this case that Mr. Watkins had been in gambling activity before?

THE WITNESS: Yes, sir I did.

THE COURT: And that Mrs. Watkins had been in gambling activities before?

THE WITNESS: Yes, I did.

THE COURT: And weren't you using that knowledge, in part, in reaching this conclusion?

THE WITNESS: I can't honestly say that because at the time I made my application for this wiretap, I did not, in fact, know that Mr. Watkins would be involved, that they would definitely call him, so—

THE COURT: No. But once you heard the conversations, don't you draw on your experience?

THE WITNESS: Yes, I imagine you do, yes.

THE COURT: Now, let me ask you this, Mr. Shapiro: Assuming he did draw on his experience and knowledge of these defendants in reaching that conclusion.

MR. SHAPIRO: Well, Your Honor, I feel that if he has drawn on experience—He is conveying the impression to the jury—

Cseh—direct

MR. SHAPIRO: Well, if they do that, Judge, I feel that my next motion would be for a mistrial because there's a very good likelihood these defendants would be convicted on their past record rather than the record that's contained here.

THE COURT: No, no, no. You have something more than merely predisposition. What you have is a series of activities over a long period of time, as I get the testimony, because they talk about having met them so many times, twenty, thirty times. These are detectives. I assume they didn't go out with them socially.

MR. SHAPIRO: I'll leave that unanswered at this time, Judge.

THE COURT: Well, it's a fair assumption, isn't it?

Well, did you go out with them socially?

THE WITNESS: To be honest with you, I've met him—I had a drink with Mr. Watkins on at least one occasion.

Cseh—cross

Q Let me ask you this: You said you spoke to Mr. Watkins on the telephone a number of times?

A That's correct.

Q The date in question is October 8, 1976, correct?

A That I spoke to him on the telephone?

Q No, the date of the arrest.

A That's correct.

Q How long prior to that date was the last time you spoke to him on the telephone?

A Approximately—Well, in between a week and a half to three weeks prior to that.

Q And what was that conversation in relation to?

A I had called Trailer Time.

Q For what purpose?

A To speak to him, to—under a ruse of buying a trailer, some equipment.

Q Do you know, in fact, the person you had spoken to was, in fact, Weldon Watkins?

A By his voice I did, yes, sir.

Q When prior to that did you hear his voice?

A Approximately a year and a half before that. Two years. I don't recall the exact date. He had called our

Cseh—cross

Q At what time did you see him enter the premises?

A Approximately—Well, in the vicinity of 5 o'clock. It may have been 4 o'clock, 5:30. I don't recall the exact time.

Q What time did you make the phone call?

A Five minutes after that, after I seen him.

Q Where did you make the phone call from?

A Somewhere in Copiague, a pay phone. Let me see now. I don't recall whether it was 7-11 or—It was a pay phone on Greak Neck Road, I believe.

Q And what the purpose of that phone call?

A To further substantiate the fact that I knew that voice to be Weldon Watkins.

Q Well, this is before the tapes were made, wasn't it, Officer Cseh—Detective Cseh?

A No, it was not.

Q When did you make that phone call?

A Approximately a week before the 8th. Or maybe it was four days. I don't recall.

Q What was the date you got the Wiretap Order?

THE COURT: Well, it's in evidence, isn't it?

Cseh—cross

Q Could have been one day, two days or longer than that?

A I don't recall. I can't give you an exact date.

Q Do you have any notes or memoranda regarding that?

A No, I don't. No.

Q Now, in making this call—Now, from what I gather, you have introduced some testimony—some testimony was introduced of calls made between—allegedly made between Christine and Weldon Watkins on the 4th, the 5th, the 6th, the 7th and the 8th, is that correct?

A That's correct.

Q Let me ask you this: Have you ever spoken to Christine Watkins on the phone?

A Yes, I have.

Q When was the last time prior to October 8th, 1976, that you spoke with Christine?

A It was approximately in the same time as I made the phone call to Weldon Watkins. In —Within a day or two of that time.

Q And where did you call Christine Watkins?

A At her home.

Q When was that call made? Do you know the date?

Cseh—cross

A No, I did not.

Q To your knowledge, did either Weldon or Christine Watkins' fingerprints appear on any of those slips?

MR. ARANEO: Objection. He says he didn't make any analysis, so how could he tell?

Q To your knowledge, did you ever see either defendant, Christine or Weldon Watkins' handwriting on any documents?

A If I did, I don't recall it.

Q Well, Detective Cseh, let's stop fencing. Did you ever arrest Christine and Weldon Watkins previous to this date?

A Yes, I did.

Q All right. And when you arrested them, they had to fill out certain documents, is that correct?

A That's correct.

Q Did you notice their handwriting on those documents?

A As I said, I wouldn't recall it.

Q All right. So you could not tell this Court— Would it be fair to say that you could not tell this Court and the jury whether or not Weldon or Christine's handwriting

Cseh—recross

Q Now, how many times have you spoken on the phone with Christine Watkins?

A The once at her home. I believe it's — just may have been once.

Q Was this before or after the tape recordings were made?

A Again, like I said before, I don't recall the exact date. It was in that vicinity. I don't remember.

Q When was the first time you had reason to believe that Weldon Watkins might appear on one of those tapes?

MR. ARANEO: Objection, Your Honor. This is outside the scope of the recross.

THE COURT: Overruled. Overruled.
*A Could, you repeat the question?

THE COURT: When did Weldon Watkins — Or is it Christine you're talking about?

MR. SHAPIRO: I lost my train of thought.

THE COURT: When did either one of them become a target of your investigation?

MR. SHAPIRO: Fine.

THE WITNESS: When I was aware that Willie Clark—there was a policy operation going on at Willie Clark's house, I knew — I figured that Weldon Watkins would be involved in this because I had known that Willie Clark worked for Weldon Watkins.

Q Officer, wasn't it your testimony that you had no idea that Weldon Watkins' voice or Christine Watkins' voice would appear on those tapes until after you heard it? Was that your testimony?

A That's what I said. I had no idea that it would. I didn't know for a fact that it would. But I figured it might, being that Willie Clark was — In fact, that's his house and they were part of the same operation.

Q In applying for this warrant for this search, for the Eavesdropping Warrant, you did not mention the name of Weldon Watkins at all, did you?

A No, I did not.

Q Did you suspect or have any probable cause to believe that Weldon Watkins would have anything to do with that operation? Did you? At least as you put down your affidavit.

A I didn't put an affidavit. Like I said, just said, I knew that Willie Clark worked for Weldon Watkins. Now,

bets to give to somebody who has no interest in this operation just as a good-will gesture? I submit to you that every penny of that $2300 was controlled by Weldon Watkins, not by Willie Clark. He was a little fish who added up the numbers. Who ran the operation? That's what you've got to look at.

And who was his agent inside? Did Christine Watkins physically have in her possession the records that Detective Cseh seized on the date of October the 8th? If you believe Mrs. Clark that Christine Watkins was in the house all day that day until — whatever time she got there until the time she was busted at night, in her own words, busted — How would Christine Watkins have been able to speak with Weldon Watkins about numbers, etc., unless she had looked at the records that Willie Clark had in his possession or in his bedroom? These records had to pass through her hands at some moment that day. Otherwise, how would she be able to

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

Unreasonable searches and seizures.
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

Criminal actions—Provisions concerning—Due process of law and just compensations clauses.
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

Rights of the accused.
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, but an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

Section 1. Citizens of the United States.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 18, United States Code, Section 2518

2518. Procedure for interception of wire or oral communictions.—(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought be be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of ths chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify —

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter [18 USCS §§2510-2520],the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter [18 USCS §§2510-2520], any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that —

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter [18 USCS §§2510-2520] to authorize such interception, may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communicaton intercepted by any means authorizied by this chapter [18 USCS §§2510-2520] shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. This presence of the seal provided for by this subsection, or a satisfactory explaination for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter [18 USCS §§2510-2520] shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of

an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of —

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that —

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was not opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter [18 USCS §§2510-2520]. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted. (June 19, 1968, P. L. 90-351, Title III, § 802, 82 Stat. 218; July 29, 1970, P. 91-358, Title II, § 211(b), 84 Stat. 654).

NEW YORK CRIMINAL PROCEDURE LAW

SECTION 700.20: EAVESDROPPING WARRANTS; APPLICATION.

1. An ex parte application for an eavesdropping warrant must be made to a justice in writing, and must be subscribed and sworn to by an applicant.

2. The application must contain:

(a) The identity of the applicant and a statement of the applicant's authority to make such application; and

(b) A full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an eavesdropping warrant should be issued, including (1) a statement of facts establishing probable cause to believe that a particular designated offense has been, is being, or is about to be committed, (2) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (3) a particular description of the type of the communications sought to be intercepted, and (4) the identity of the person, if known, committing such designated offense and whose communications are to be intercepted; and

(c) A statement that such communications are not otherwise legally privileged; and

(d) A full and complete statement of facts establishing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence sought; and

(e) A statement of the period of time for which the eavesdropping is required to be maintained. If the nature of the investigation is such that the authorization for eavesdropping should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter, and

(f) A full and complete statement of the facts concerning all previous applications, known to the applicant, for an eavesdropping warrant involving any of the same persons, facilities or places specified in the application, and the action taken by the justice on each such applicaton.

3. Allegations of fact in the application may be based either upon the

pesonal knowledge of the applicant or upon information and belief. If the applicant personally knows the facts alleged, it must be so stated. If the facts stated in the application are derived in whole or part from the statements of persons other than the applicant, the sources of such facts must be either disclosed or described, and the application must contain facts establishing the existence and reliability of the informants or the reliability of the information supplied by them. The application must also state, so far as possible, the basis of the informant's knowledge or belief. Affidavits of persons other than the applicant may be submitted in conjuction with the applicaton if they tend to support any fact or conclusion alleged therein. Such accompanying affidavits may be based either on personal knowledge of the affiant, or information and belief with the source thereof and the reason therefor specified.

SECTION 700.30: EAVESDROPPING WARRANTS; FORM AND CONTENT.

An eavesdropping warrant must contain:

1. The name of the applicant, date of issuance, and the subscription and title of the issuing justice; and

2. The identity of the person, if known, whose communications are to be intercepted; and

3. The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted; and

4. A particular description of the type of communications sought to be intercepted, and a statement of the particular designated offense to which it relates; and

5. The identity of the law enforcement agency authorized to intercept the communications; and

6. The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained; and

7. A provision that the authorizaton to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article, and must terminate upon attainment of the authorized objective, or in any event in thirty days; and

8. An express authorizaton to make secret entry upon a private place or premises to install an eavesdropping device, if such entry is necessary to execute the warrant.

SECTION 700.50: EAVESDROPPING WARRANTS; PROGRESS REPORTS AND NOTICE.

1. An eavesdropping warrant may require reports to be made to the issuing justice showing what progress has been made toward achievement of the authorized objective and the need for continued eavesdropping. Such reports shall be made at such intervals as the justice may require.

2. Immediately upon the expiration of the period of an eavesdropping warrant, the recordings of communications made pursuant to subdivision three of section 700.35 must be made available to the issuing justice and sealed under his directions.

3. Within a reasonable time, but in no case later than ninety days after termination of an eavesdropping warrant, or expiration of an extension order, except as otherwise provided in subdivision four, written notice of the fact and date of the issuance of the eavesdropping warrant, and of the period of authorized eavesdropping, and of the fact that during such period communications were or were not intercepted, must be personally served upon the person named in the warrant and such other parties to the intercepted communications as the justice may determine in his discretion is in the interest of justice. The justice, upon the filing of a motion by any person served with such notice, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and warrants as the justice determines to be in the interest of justice.

4. On a showing of exigent circumstances to the issuing justice, the service of the notice required by subdivision three may be postponed by order of the justice for a reasonable period of time. Renewals of an order of postponement may be obtained on a new showing of exigent circumstances.

SECTION 710.60: MOTION TO SUPPRESS EVIDENCE; PROCEDURE.

1. A motion to suppress evidence made before trial must be in writing and upon reasonable notice to the people and with opportunity to be heard. The motion papers must state the ground or grounds of the motion and must contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers.

2. The court must summarily grant the motion if:

(a) The motion papers comply with the requirements of subdivision one and the people concede the truth of allegations of fact therein which support the motion; or

(b) The people stipulate that the evidence sought to be suppressed will not be offered in evidence in any criminal action or proceeding against the defendant.

3. The court may summarily deny the motion if:

(a) The motion papers do not allege a ground constituting legal basis for the motion; or

(b) The sworn allegations of fact do not as a matter of law support the ground alleged; except that this paragraph does not apply where the motion is based upon the ground specified in subdivision three of section 710.20.

4. If the court does not determine the motion pursuant to subdivision 2 or 3, it must conduct a hearing and make findings of fact essential to the determination thereof. All persons giving factual information at such hearing must testify under oath, except that unsworn evidence pursuant to subdivision 2 of section 60.20 of this chapter may also be received. Upon such hearing, hearsay evidence is admissible to establish any material fact. (Effective 6/21/75)

5. A motion to suppress evidence made during trial may be in writing and may be litigated and determined on the basis of motion papers as provided in subdivisions one through four, or it may, instead, be made orally in open court. In the latter event, the court must, where necessary, also conduct a hearing as provided in subdivision four, out of the presence of the jury, if any, and make findings of fact essential to the determination of the motion.

6. Regardless of whether a hearing was conducted, the court, upon determining the motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination.

Supreme Court, U. S.
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OCT 25 1978
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In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-564

WELDON WATKINS and
CHRISTINE WATKINS,

Petitioners,

-against-

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

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Table of Contents

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
Argument	5
Conclusion	15
Appendix	

In The

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OPINIONS BELOW

The opinion of the Supreme Court, Suffolk County is reported at 89 Misc. 2d 870, 393 N.Y.S.2d 283. The opinion of the Appellate Division, Second Department is reported at 406 N.Y.S. 2d 343, and is not

yet officially reported. The order of the New York Court of Appeals denying leave to appeal to that court is reported at 45 N.Y. 2d 785.

JURISDICTION

The judgment of the New York Court of Appeals was entered on July 6, 1978, and a motion to reconsider was denied on July 28, 1978. The petition for a writ of certiorari was filed on September 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether, by not raising the issue on appeal, petitioners have waived any claim concerning the denial by the Trial Court of their motion for a hearing to determine the veracity of certain statements underlying an application for electronic surveillance, and, if the issue is not waived, whether their allegations were sufficient to warrant a hearing.

2. Whether the conversations between petitioners should have been suppressed on the ground they constituted privileged interspousal communications.

3. Whether it was necessary to name petitioners in the application for electronic surveillance and, if it was, whether the failure to name them requires that they be given a new trial.

STATEMENT

Following a jury trial in the Supreme Court, Suffolk County, New York petitioners were each convicted on one count of Promoting Gambling in the First Degree, a class E felony in violation of New York Penal Law § 225.10. Petitioner Christine Watkins was also convicted on one count of Possession of Gambling Records in the First Degree, a class E felony, in violation of New York Penal Law § 225.20.[1]

[1] Co-defendants Willie Clark and Frederick Hill pleaded guilty to various counts before trial.

Petitioner Weldon Watkins was sentenced to a definite term of imprisionment of one year. Petitioner Christine Watkins was sentenced to probation for a period of five years on each count, the sentences to run concurrently. The Appellate Division, Second Department affirmed (Pet. App. 68-69)[2], and the New York Court of Appeals denied petitioners' application for leave to appeal (Pet. App. 70). Petitioner Weldon Watkins is presently incarcerated.

The People's evidence consisted primarily of a stipulation stating that Willie Clark had conducted a policy operation from his home between October 4, 1976, and October 8, 1976, and that Willie Clark's telephone had been used by him in furtherance of the policy operation during that period; tape recordings of policy-related

[2]Petitioners included only the order and not the opinion of the Appellate Division in their Appendix. For the convenience of the Court, we have appended a copy of the Appellate Division's opinion to our brief, infra.

conversations between petitioners recorded over Willie Clark's telephone between October 4, 1976, and October 8, 1976 pursuant to court-authorized electronic surveillance; and policy slips and related records seized from Willie Clark's house on October 8, 1976 pursuant to a search warrant which established that more than three thousand policy wagers totalling more than $900.00 had been received by the operation on that day. The evidence established that Weldon Watkins was the "boss" of the policy operation, and that Christine Watkins was a controller who would relate business information to Weldon, and would deliver instructions from Weldon to other members of the operation.

ARGUMENT

1. Petitioners contend (Pet. 6-8) that they were denied Due Process because they were not granted a hearing on their claim that the application for authorization

to wiretap contained statements that were not true. Petitioners did not raise this claim in their brief to the Appellate Division, but argued it for the first time in their application to the Court of Appeals for leave to appeal. Accordingly, petitioners have waived their right to present this claim to this Court. See Radio Station WOW v. Johnson, 326 U.S. 120; cf. Lawn v. United States, 355 U.S. 339, 362 n. 16.

This claim was raised by co-defendant Willie Clark on appeal, however. The Appellate Division, after consideration of the briefs and oral argument, affirmed the conviction without opinion, and the Court of Appeals denied his application for leave to appeal. Clark then petitioned the United States District Court for the Eastern District of New York (Bramwell, J.) for a writ of habeas corpus, citing as one ground the failure of the trial court to grant a hearing to consider his claim of falsehood in the

application for the wiretap. On April 4, 1978, following the submission of memoranda and oral argument, the Court denied the petition on the ground that, under Stone v. Powell, 428 U.S. 465, and its progeny, the ruling of the state courts on essentially a Fourth Amendment issue could not be reviewed by the Federal Courts. This ruling was appealed to the United States Court of Appeals for the Second Circuit which affirmed in an oral opinion following argument (Clark v. Finnerty, No. 78-2070, decided August 30, 1978). It did not reach the Stone issue, however, because it agreed with the People's argument that the allegation of falsehood was insufficient to justify the holding of a hearing. The Court of Appeals considered the significance of Franks v. Delaware, ____U.S.____ (No. 77-5176, decided June 26, 1978), on which petitioners--represented by the same counsel as Clark--rely, and held that that case only required that states

permit a hearing to be held if a sufficiently supported allegation of perjury is made. Since it found the allegation in this case insufficient,[3] and New York has a well-established procedure that permits a hearing upon a proper allegation, see People v. Alfinito, 16 N.Y. 2d 181; New York Criminal Procedure Law § 710.60, the Court affirmed the denial of the petition for a writ of habeas corpus. This reasoning is fully applicable here, and, accordingly, no constitutional issue is raised by either of petitioners' first two points.

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[3]In his application for electronic surveillance authorization, Detective Jay Cseh stated that on September 11, 1976, "at approximately 6:00 P.M.," he overheard and recorded with the permission of a confidential informant a telephone conversation between Willie Clark and the informant over the subject telephone, and that he overheard "code numbers being discussed, track and handles being discussed, and 'hits' for that day's policy transactions." As part of a pre-trial motion to suppress the fruits of the surveillance, Willie Clark filed an affidavit charging that this statement was "false" since "On September 11, 1976 at about 6:00 P.M. I did not on telephone number 842-2184

2. Petitioners contend (Pet. 8-10) that the conversations between them that were intercepted pursuant to the wiretap authorization should have been suppressed as privileged communications between spouses. The Appellate Division agreed with the Trial Court, however, that "'the privilege does not extend to communications between spouses in which they are jointly advancing a criminal conspiracy or aiding each other in the commission of an on-going crime.' (People v. Watkins, 89 Misc. 2d 870, 874, 393 N.Y.S. 2d 283, 289; see, also, United States v. Kahn, 471 F. 2d 191, revd on other grounds 415 U.S. 143, 94 S. Ct. 977, 39 L. Ed. 2d 255)" (Appendix, infra). Since it is well established that the marital privilege is not

---

[3](continued) discuss code numbers for collectors and/or runners, shortages, track and handles and hits for that day or any policy transactions at that time."

The People argued before the District Court and the Court of Appeals that this allegation was insufficient to warrant a hearing under the test laid down in Franks v.

constitutionally mandated, but may be fashioned by the courts and legislatures in light of common sense and reason, see Lutwak v. United States, 344 U.S. 604, 613-614; Matter of September, 1975 Special Grand Jury, 435 F. Supp. 538, 545 (N.D. Ind.), petitioners may not seek review by this Court of the scope of New York's privilege. See 28 U.S.C. § 1257 (3).

Petitioners suggest in their "Questions Presented"--but do not discuss in their argument--that, once the intercepting officers realized they were listening to a conversation between a husband and wife, they should have terminated their intercept, and advised the issuing court of this fact so that the

[3](continued) Delaware, supra, since: (1) there was no allegation of perjury; (2) Clark's statement was a classical negative pregnant since he did not deny participating in the conversation but only that it took place at 6:00 P.M.; (3) Clark did not deny that someone, even if it was not he, participated in the conversation with the informant over his telephone; and (4) the affidavit, even without reference to the allegedly false portion, contained sufficient facts upon which a finding

Court could determine whether the conversation was privileged. This claim was raised for the first time at oral argument before the Appellate Division, and was not directly addressed by that court.

There is no statutory requirement that such a procedure be followed, and it certainly is not one that the Constitution requires. The marital privilege, as the Appellate Division correctly observed, is a testimonial privilege that bars one spouse from testifying against the other at trial (Appendix, supra). Even if a tape recording of a conversation between spouses would come within this privilege, petitioners were able to move for suppression prior to trial. This procedure sufficed to protect any trial rights they might have had.

[3](continued) of probable cause could be based. These arguments formed the basis for the oral opinion of the Second Circuit in Clark.

3. Finally, petitioners contend (Pet. 10-18) that there was an intentional failure to name them in the wiretap application, and that the proper remedy is suppression. Their reliance on United States v. Donovan, 429 U.S. 413, is misplaced. The Court there noted in dictum that, had the failure to name the petitioner in the wiretap application been intentional and "for the purpose of keeping relevant information from the District Court that might have prompted the Court to conclude that probable cause was lacking" the case before them might have been different. Id. at 436, n. 23. Petitioners make no attempt here to explain how the failure to name them, even if intentional, could have enhanced the probability that the authorization would issue.

In any event, the Appellate Division correctly found (Appendix, infra):

> The police obviously recognized the possibility that conversations involving at least one of the defendants would be intercepted.
>
> However, there is no proof that the authorities, at the time they applied for the warrant, (1) knew or suspected that they would intercept conversations between the defendants or (2) withheld the names of the defendants from the Court so that it could not prevent them from intercepting arguably privileged exchanges. There is no reason to believe that the inclusion of the names of the defendants would have caused the Court to reject the application for the warrant.

The only possible way the investigating officers could have benefitted from withholding petitioners' names if they had probable cause to believe they would be overheard is that the issuing court might otherwise order them not to intercept conversations between petitioners. Since the

marital privilege does not apply in New York to conversations between spouses about an on-going crime in which they are both involved, there was no possibility that the issuing court would have denied the application or limited its scope if it knew of petitioners' possible involvement. The inclusion of petitioners in the application could only have enhanced the existence of probable cause. Accordingly, petitioners have failed to meet their burden of showing that the failure to name them -- if it was intentional[4] -- was for an improper purpose, and the remedy of suppression is unavailable to them. See United States v. Scafidi, 564 F.2d 633, 642 (2d Cir.); United States v. Diadone, 558 F.2d 775, 781 (5th Cir.), cert.denied, ___U.S.___, 98 S.Ct. 1239; United States v. Abrahamson, 553 F.2d 1164, 1172 (8th Cir.), cert.denied, 433 U.S. 911

[4]Even if the failure to name petitioners were intentional, the fruits of the electronic surveillance should not be suppressed if the warrant still would have issued had they been named. Cf. Franks v. Delaware, No. 77-5176 (Decided June 26, 1978) (Hearing on motion to suppress fruits of search warrant need not be held if, setting aside the portion of the application that is alleged to be perjurious, there is probable cause to justify issuance of the warrant).

CONCLUSION

THE PETITION FOR A WRIT OR CERTIORARI SHOULD BE DENIED.

Dated: Riverhead, New York,
October 17, 1978

Respectfully submitted,

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APPENDIX

The Opinion of the Court

in People v. Watkins can be found at

406 N.Y.S. 2d 343, and has not been filmed.